

'OPINIONS
OF THE
CORPORATION COUNSEL
AND ASSISTANTS

FROM
APRIL 15, 1907, TO DECEMBER 31, 1908.



COMPILED AND EDITED BY
EDWARD J. BRUNDAGE
CORPORATION COUNSEL



THE HENRY O. SHEPARD CO., PRINTERS, CHICAGO.

INTRODUCTORY.

The Corporation Counsel's office is requested very frequently to prepare written opinions by the various departments. These requests require consideration of nearly every conceivable branch of municipal law. During the past year many important questions have been considered. Believing that the preservation in permanent form of those opinions, which discuss subjects of general interest, and which are supported by ample citation of authorities, will be of great assistance to the city and especially to this department, I have felt it incumbent upon me to select the most important ones and have them compiled in book form.

I have personally supervised the preparation of this compilation, and take great pleasure at this time in expressing my appreciation of the careful, conscientious and painstaking work which has been rendered by the various Assistants Corporation Counsel in so thoroughly and exhaustively discussing the questions which have been submitted to them.

A handwritten signature in cursive script, reading "Edward J. Brundage". The signature is fluid and elegant, with a large initial "E" and a long, sweeping underline.

Corporation Counsel.

Chicago, December 31, 1908.

OPINIONS

OF THE

CORPORATION COUNSEL AND ASSISTANTS

FROM

APRIL, 1907, TO DECEMBER 31, 1908.

APRIL 18, 1907.

GEORGE M. SHIPPY, Esq., General Superintendent of Police.

Dear Sir:

We have a letter from your predecessor submitting a communication from Lieutenant Hartnett and asking to be advised as to the right of the widow of John Minniciani and the widow of Daniel Fitzgerald to conduct the saloon business heretofore conducted by their respective husbands in their lifetime.

We have to advise you that a license to conduct a dramshop is personal and does not authorize any person except the licensee to engage in that business. It can not be sold, assigned or transferred in any manner, and the widow of the licensee has no right to conduct a dramshop under the license issued to her husband in his lifetime.

Inasmuch as the widow has no right to conduct the dramshop under the license issued to her husband, she, of course, has no right to a renewal of the license and can not sell such right under the Harkin ordinance.

This is true with all places, and it is immaterial whether the location is in a local-option district or an open district.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

APRIL 29, 1907.

GEORGE M. SHIPPY, ESQ., General Superintendent of Police.

Dear Sir:

I have received your letter dated April 22, relating to the applications of A. J. Henning, 5849 South Halsted street, Oscar Geyer, 1134 West Fifty-eighth street, and Thomas B. Gilmore, 1400 West Fifty-ninth street, for saloon licenses, and accompanied by the statements of License Officer John O'Grady, of the Seventeenth Precinct, also by the required petitions of certain voters and by the petitions of the Lincoln League protesting against the granting of said licenses on the ground of their proximity to a church.

Sections 13 and 14 of Chapter 57 of the Revised Ordinances of the Town of Lake are still in full force and effect, as follows:

"Section 13. No license shall be granted to keep a saloon within 150 feet of any public park, parkway, boulevard, public school or church. . . .

"Section 14. All applications for license to keep a saloon shall be made in writing, stating the time for which such license is desired, not less than three months nor more than one year, signed by the applicant and accompanied by a petition of a majority of the legal voters of the town residing within one-eighth of a mile from the place where such saloon is to be kept; such petitions shall also state that the place where such saloon is to be kept does not fall within the restrictions prescribed by Section 13."

There appear to be three questions involved in these applications: first, whether the 150 feet must be measured between the saloon property and the church property or between the buildings themselves; second, the method of measuring the prohibited distance; and, third, whether a saloon engaged in business at its present location before the church was erected in its neighborhood is affected by Section 13 of the ordinance. No construction of the above or any similar act is found among the reported decisions in this State.

1. As regards the first question, no reason appears why the measurement should be taken between the lot lines bound-

ing the land on which the saloons and the church are located. It would seem that the language of the ordinance should be given its ordinary meaning, and that the distance should be measured between the church building and the saloon buildings.

To this effect see :

Commonwealth v. Jones, 142 Mass., 573.

In re Liquor Locations, 14 R. I., 733.

2. The cases deciding on the manner in which such measurements should be taken are not uniform, some holding that the distance should be measured in a straight line between the buildings, and others that the measurement should be of the shortest way of access between the two buildings. The latter view appears to have been adopted in most of the cases where the act or ordinance under construction was intended to regulate the proximity of saloons to churches and schools in the same immediate neighborhood.

In New York, where the question has arisen most often, it has been held that where the statute prohibits the issuance of a certificate to sell liquors in premises, the nearest entrance to which is within 200 feet of the nearest entrance to a dwelling, without first obtaining certain consents, the distance should be measured by the shortest feasible way of passage from one to the other.

In re Underhill, 39 N. Y. Supp., 575.

The New York statute prohibiting saloons on the same street and within 200 feet of churches and schools expressly directs that the measurement shall be made from the principal entrance of the buildings. In New Jersey, where a city ordinance prohibited the granting of a license to sell intoxicating liquor within 200 feet of a church, it was held that the prohibited distance must be measured by the nearest mode of access.

Trustees of Warren Street Chapel v. Board of Commissioners, 56 N. J. L., 411.

See also :

Leigh v. Hind, 9 B. B. & C., 774, and English cases cited.

Those courts in other jurisdictions, which have held that the prohibited distance from a church, school, court house, etc., must be measured on a straight line, have had to deal chiefly with two kinds of cases: first, with those arising under statutes purporting to create prohibition districts of substantial size of a mile or more in extent; and, secondly, where saloons are prohibited within a certain distance of schools, churches, etc., on the same street.

Sheehey v. Johnson, 12 App. Cas. (D. C.), 92.

Butler v. The State, 89 Ga., 821.

Jones v. Commissioners, 106 N. C., 436.

Commonwealth v. Jones, 142 Mass., 572.

It would seem highly unfair to refuse to issue a license because the rear of the saloon building happened to be within 150 feet of the rear of a church building fronting on another street, with no means of passing between them, and I do not believe that this ordinance was intended to be so construed.

I am of opinion that the distance of 150 feet should be measured from the nearest door of the church to the nearest door of the saloon, by the shortest feasible way of passage from one to the other.

3. The third question is, whether a saloon established at its present location before the coming of the church into its vicinity is affected by the prohibition in Section 13. It is well settled under the above ordinance that a new and original petition of voters residing within the one-eighth mile radius must be presented by the applicant for a license at least once a year. (See amendment to Section 14.) Also, that each license expires by its own terms at the end of the year. The holder of a license acquires no vested rights in his location, nor, having once been established in business in a particular place, is he insured in any way against the approach of schools and churches into his neighborhood. He must take his chances in the same way that the owner of a residence risks the encroachments of business into his neighborhood. I am of opinion that priority of location makes no difference as to the rights of the applicant.

As the statements of License Officer O'Grady do not indi-

cate the shortest means of access between the nearest entrances to the church and saloon buildings, the application of the rule of measurement above recommended is left to your department.

Yours truly,
WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:
GEORGE W. MILLER,
First Assistant Corporation Counsel.

APRIL 29, 1907.

HON. FRED A. BUSSE, Mayor of Chicago.

Dear Sir:

I beg leave to return Document No. 80, which is an ordinance passed by the City Council on the 15th day of this month, fixing the amount of the bond to be given by the Oil Inspector to be appointed under the provisions of an "Act to Revise the Law in Relation to Oil Inspection," approved March 12, 1874.

In brief, by the act referred to, the legislature of this state has authorized the appointment of Oil Inspectors, provided for the giving of bond, and in a comprehensive manner has indicated the nature and character of the duties. Under this act, the Mayor, with the approval of the City Council, is to appoint the Inspector and fix his compensation, which is to be paid by the party or parties requiring his services. The bond to be given is to be in such sum as shall be required by the City Council, with one or more sureties to be approved by the Mayor.

The City Council, a number of years ago — but subsequent to the act of 1874 referred to — by ordinance, undertook to create the office of Oil Inspector, to fix his salary and that of his deputies, and to require all of the fees collected through that office over and above the amount required to pay salaries, running expenses, etc., to be paid into the City Treasury.

In the case of *City of Chicago v. Robert E. Burke*, 226 Ill., 191, the Supreme Court held that the ordinance referred

to (Sections 1535 to 1543, both inclusive — Revised Municipal Code of Chicago of 1905) was in contravention of the terms of the act of 1874 and void.

This leaves the appointment of Oil Inspector and the fixing of his compensation to be done by the Mayor, with the approval of the City Council, under the terms of the statute referred to, and the only thing which the City Council is authorized to do under the language of the statute is by ordinance to fix the amount of the bond to be given.

Document No. 80 fixes the amount of the bond and formally repeals the sections of the Municipal Code held to be void by the decision referred to.

I therefore have the honor to advise you to approve the ordinance in question.

Yours very truly,
EDWARD J. BRUNDAGE,
Corporation Counsel.

APRIL 29, 1907.

E. J. MAGERSTADT, ESQ., City Collector.

Dear Sir:

We respectfully submit the following in reply to your several questions concerning the issuing of dramshop licenses:

(1) A is conducting a dramshop on Dearborn street under a valid license and desires to move his place of business to Washington street at the expiration of the present license period. Under the ordinances he has the clear right to do this.

(2) B is conducting a dramshop on Van Buren street and desires to have his license renewed, but the landlord refuses to give him a new lease and declares his intention of leasing the premises to C, who has applied for a license to keep a dramshop there. As a matter of course there can be but one dramshop at the premises, and it is not within our power to determine the rights of these various claimants to the premises. The only thing the City can do is to accept the money from each applicant, stating distinctly and clearly to him that if it is finally determined that he is not entitled to the premises he will lose his license fee.

(3) D and E are in partnership conducting a saloon under a valid license, and one of them desires to transfer his right of renewal while the other refuses to join in the transfer. In this case there can be no valid transfer and the license will lapse. Unless the partners unite in an application for a renewal to themselves, no license can be issued.

(4) In several cases it appears that a number of different assignments of the right of renewal have been made and put on file in your office. The best rule to adopt is that one applying to the recording of deeds, and that is that you recognize as valid the assignment that is first in your hands. Of course, if you are satisfied that the first one to reach you is fraudulent, the rule will be suspended in that instance.

I would suggest that you note upon each assignment the day and hour it was filed with you.

(5) If a person now conducting a dramshop declines to apply for a renewal of his license and refuses to assign his right of renewal, that license goes out of existence and none can be issued in its place until the number of licenses in force is reduced to one for each 500 of the population.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

APRIL 30, 1907.

HON. FRED A. BUSSE, Mayor.

Dear Sir:

Agreeable with your request I have the honor to advise you that your power to refuse or to grant a license in the above entitled matter is governed by the Municipal Code, and it is immaterial how many citizens petition you for such a license, or how many people protest against the giving of such a license, except in so far as such petitions or protests contain information that may be advisory to you.

The ordinance provides:

First. That the owner, lessee, manager or agent of any

ball park shall make an application, in writing, to you, setting out his full name and residence, if an individual, and the full name and residence of its principal officers, if a corporation, giving to you the location and description of the park for which it is desired to secure the license.

Second. The Mayor shall thereupon cause to be made an examination of such park for the purpose of ascertaining whether the same is properly inclosed, and whether the grandstand, if any, or other seating facilities provided, are constructed in a safe and suitable manner for the purposes they are designed to be used for.

Third. The Mayor shall also ascertain whether the park is so located as not to prove a nuisance.

Fourth. The Mayor shall also ascertain whether the park is provided with proper means of ingress and egress to afford adequate accommodation for the maximum number of persons which may or might at any time be present at such park.

Fifth. If the Mayor shall be satisfied on the foregoing propositions he SHALL issue, or cause to be issued, to such applicant a license, which shall be delivered to the applicant upon the payment to the City Collector of the stipulated fee.

You will note these provisions are clear, concise, practical and to the point; and you will, I am sure, have no difficulty in easily coming to a conclusion on all propositions with the possible exception of No. Three.

As to the question of "nuisance," I have the honor to advise you that the mere fact that certain persons may complain that the playing of baseball in their immediate neighborhood disturbs their peace and quietude is not sufficient in and of itself to justify you in coming to the conclusion that the conduct of the park is as a matter of law a nuisance.

You must be satisfied from the evidence that the park as conducted does, in fact, actually disturb the peace of the entire neighborhood, within the natural and reasonable meaning of those words, and not within any forced or unreasonable construction of such language.

"Nuisance," within the meaning of our ordinance, means

a thing that in and of itself violates the public morals, the public health, or the public peace of the community.

These three important branches under control of civic government, by virtue of our police powers, have been construed to mean — “not the mere judgment or preference of certain people, who conclude that the matter complained of is contrary to *their* particular peace, or contrary to *their* particular code of morals,” but “must be contrary and at positive variance with the entire community which may be affected by the continuance of the matter complained of.”

Inasmuch, therefore, as it is impossible for you to determine that the playing of baseball is *per se* a nuisance, but must depend entirely upon how the game is conducted when in actual operation, it leaves no discretion with you whatsoever, provided you are satisfied the applicant is of good moral character, and you have no authority to refuse a permit.

If, however, at any time in the future the park becomes a nuisance, the law provides ample remedy to meet that situation.

I do not believe the fact that the ball park encroaches upon what is commonly known as Hill Court should, in and of itself, mitigate against the granting of the license, inasmuch as I find that the city received on January 14, 1907, \$75.00 from the owners or lessees of this park as annual compensation for the use of the south fifteen feet of Hill Court, between Clark street and Ashland avenue, from January 1, 1907, to December 31, 1907; subject, however, to revocation by the city on thirty days' notice in writing.

While the city probably lacks authority to rent such space and accept such compensation under its present charter, we must not overlook the fact that it has been the custom to accept such fees, and the annual income to the city is over \$100,000 from this source and paid principally by large downtown stores and business houses.

Yours very truly,

EDWARD J. BRUNDAGE,
Corporation Counsel.

MAY 4, 1907.

HON. FRED A. BUSSE, Mayor,

Dear Sir:

Replying to your request for a construction of the ordinance adopted by the City Council on April 4, 1907, relative to granting permits by the Commissioner of Public Works for newspaper stands, I beg to advise you as follows:

The ordinance referred to is in the following language:

“The Commissioner of Public Works is hereby authorized to permit stands to be maintained on the public streets between the hours of 5 A.M. and 8 P.M., *which shall be used for the purpose of exhibiting for sale daily newspapers* printed and published in Chicago. Such stands as authorized shall not exceed 3 feet 6 inches in height, 22 inches in width and 14 inches in depth, and nothing shall be exhibited, offered or sold therefrom except *daily papers* as above described. All such stands shall be removed at the discretion of the Mayor or Commissioner of Public Works.”

By the plain terms of this ordinance the use of these stands is limited to the “purpose of exhibiting for sale *daily newspapers*” printed and published in this city. There is nothing in the language of the ordinance which would justify a construction that the person to whom such a permit is granted must exhibit for sale *all* of the daily newspapers printed and published in this city. The only limitation is, that nothing else shall be exhibited, offered or sold therefrom “except daily papers,” etc., leaving the party to whom such permit may be granted to exhibit for sale such of Chicago’s daily papers as he may desire or find a market for. There is nothing in the ordinance which would warrant compelling a person to whom such a permit may be granted to keep all of Chicago’s daily papers as a condition upon which he will be permitted to keep any of them.

Yours very truly,

EDWARD J. BRUNDAGE,

Corporation Counsel.

MAY 6, 1907.

JOHN D. RILEY, ESQ., Superintendent of Maps.

Dear Sir:

I am in receipt of your letter of April 30, requesting an opinion from this office on certain questions arising over compilation of the map showing prohibition and local option districts in Chicago.

1. I would say that the language of the Town of Lake ordinance, Revised Municipal Code, p. 754, prohibiting saloons within 150 feet of any public park, parkway, boulevard, public school or church, indicates an intention to protect future parks, boulevards, etc., as well as those already in existence. The applicant for a license is required to present a new petition of voters each year, and must state therein that the location of his saloon does not fall within the restrictions in regard to proximity of parks, schools, churches, etc.

2. The Norwood Park ordinance of September 14, 1874, provides that any person who shall, within the corporate limits of said village, sell or give away any intoxicating liquors, shall forfeit and pay to said village on conviction a penalty, etc. The ordinance is thus general in its effect and covers future additions to the corporate limits of the village.

3a. The act of February 14, 1855, amending the charter of Northwestern University, Revised Municipal Code, p. 756, prohibits the sale of liquors within four miles of the location of said university. It will be seen that the statute refers only to one particular, namely, "the location" of said university, and it will be presumed that the legislature was aware of such location at the time this amendment was passed.

Sutherland on Statutory Construction, Section 331.

In the case of the *County of Cook v. Sesterhenn* in the Criminal Court, which involved a construction of the above amendment, Judge Tuley, in a decision rendered July 30, 1904 (*Chicago Legal News*, August 6, 1904), found, as a matter of fact, that, in July, 1854, the trustees of said university filed for record a plat of certain land in Evanston, entitled "Northwestern University Grounds," and that on February

14, 1855, said grounds were "the location" of the university, and were bounded as follows: On the east by Lake Michigan; on the north by what is now Lincoln avenue; on the west by Chicago avenue, now Sheridan road, and on the south by University place, now called Sheridan road.

The conclusion reached in the decision of Judge Tuley is that the four-mile limit shall be measured in a straight line from the outer edge of the university grounds, and while that decision is not binding, except as regards the purpose for which it was rendered, it is entitled to much respect. If it had been held that the distance should be measured from any particular building on the grounds, the objection occurs that such building may be removed or destroyed, whereupon the basis and reason for such measurement would be lost. If the measurement be taken from a point in the center of the grounds the statute would hardly be complied with, since a saloon four miles from such center would necessarily be *within* four miles of a large portion of the grounds, and no reason can be shown why one part of the location should be protected more than another. I am of opinion that Judge Tuley's construction of the statute was the correct one, and that the four miles should be measured from the outer edge of the university grounds *as above bounded*.

3b. The west side of Ridge road, between Devon avenue and Pratt street, is prohibition territory, if within the four-mile radius of Northwestern University grounds as specified by the statute. Although excepted from the operation of the Rogers Park ordinance of August 17, 1878, the act of the legislature is paramount, and is in full force and effect.

Trausch v. County of Cook, 147 Ill., 634.

Trusting that your questions will be answered by the above, I am,

Yours truly,

WM. K. OTIS,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

MAY 15, 1908.

JOHN C. WILLIAMS, ESQ., Attorney, Sanitary District.

Dear Sir:

Your favor of 6th inst., addressed to Mr. Emil C. Wetten, First Assistant Corporation Counsel, has been referred to me for reply.

As I understand the situation, the Sanitary District is desirous of laying a conduit in Western avenue and other streets of the city for the purpose of transmitting electricity from the sub-station of the Sanitary District, at Thirty-first street and Western avenue, to a new pumping station of the district to be erected at Wilmette near the lake, and your contention is that, inasmuch as this is necessary to enable the district to carry on the work which it was organized to do, the district is acting therein in its public capacity, as distinguished from what has been termed in previous opinions from this department its private capacity, which it has been held to occupy in the supplying of electrical energy to private consumers, and that by reason of such work being public in character, as aforesaid, the district has the right to lay conduits in such streets as it may designate or select for that purpose, the only qualification being that the public use is not unnecessarily interrupted or interfered with and the property is restored to its former usefulness as soon as practicable.

In order to arrive at a proper solution of the questions involved, it will be necessary to consider and determine the powers and duties of the City of Chicago and the Sanitary District, both with respect to their relations and duties to the general public and their relations and duties to each other. The only power of a municipality directly involved in the questions at issue is as to their respective rights in and to the use of the streets of the city.

The City of Chicago and the Sanitary District are separate and distinct municipal corporations, and they each possess separate and distinct purposes, functions and powers.

See *Wilson v. Board of Trustees*, 133 Ill., page 447.

Both municipalities are absolute creatures of the Legislature and can exercise such powers only as are expressly con-

ferred or necessarily incident thereto. It is further conceded that the paramount authority over the streets of the city exists in the Legislature, and that in the absence of any constitutional prohibition the Legislature has absolute control over municipal corporations, to create, change, modify or destroy them at pleasure.

As to the City of Chicago:

The City of Chicago is a municipal corporation proper, and as organized constitutes the local government, including both territory and inhabitants, subsidiary to that of the State.

The Cities, Villages and Towns Act, the provisions of which have been adopted by the City of Chicago, and under which it is organized and exists, and particularly Clauses 7 and 9 of Article V thereof, expressly vest the City of Chicago with the care and control of its streets.

With particular reference to the question of the control of streets as between different municipalities, see *Kreigh v. City of Chicago*, 86 Ill., page 410 of opinion:

“The authority to establish and open streets and improve and keep them in repair, as the public necessities require, is *vital to the well-being of municipal corporations.*”

It will be admitted, I take it, that the express delegation of this power with reference to streets by the Legislature to the City of Chicago, charges the city with a duty in regard thereto, and the scope and limits of such duty is clearly prescribed by the provisions of the Cities and Villages Act, and that there is therefore an express delegation of power with reference to an express subject, to be exercised in a manner clearly prescribed; and that thereby the city becomes the trustee of the general public in the care and control of such streets, subject only to the continuing power of the Legislature with respect thereto.

As to the Sanitary District:

The Sanitary District was organized for a governmental purpose, but not for a purpose like to that or those of a city or ordinary municipality. In this respect the Sanitary District may be likened to a park municipality. With reference to the status of the Sanitary District our Supreme Court, in the case of *Wilson v. Board of Trustees*, above cited, says:

“The district was organized pursuant to an affirmative vote of the electors within its limits *as a municipal corporation for sanitary purposes*, entirely distinct from and independent of the government of the City of Chicago, and of that of every other municipal corporation, and it has municipal authorities of its own, elected by the electors within the district, pursuant to the requirements of its charter, whose functions are in no wise connected with any other municipal government.”

The acts of the Legislature under which the Sanitary District is organized and operates clearly set forth its powers, functions and duties, and it thereby becomes charged with a duty to the public to carry out the purposes for which it was organized.

Therefore, it seems clear that the two municipal corporations are each organized for separate and distinct purposes and possess separate and distinct governmental functions in their relations to the public, and that such functions are so essentially distinct and different that each may operate within its own particular field, as designated by the Legislature, without in any manner interfering or conflicting with the other. Bearing this in mind, we will now consider their respective rights in and to the streets of the city.

As above stated, the Legislature has clearly, under the Cities, Villages and Towns Act, vested the City of Chicago with an express power and duty relative to its streets, and until the contrary appears such control must be admitted to be an exclusive one. See, again, *Kreigh v. City of Chicago*, *supra*, wherein the Supreme Court, in referring to the question of the control of streets as between a park board and the city, page 410 of opinion, says:

“And it is never to be presumed that the Legislature, having invested them with this power, has, at the same time, authorized them to surrender it to others over whose acts they can exercise no control. It devolves on those who assert the existence of such an extraordinary authority to prove it by the clear letter of the law.”

It must be remembered that the Sanitary District has been defined to be a separate and distinct municipality, over

the acts of which the municipality of the City of Chicago can exercise no control.

As opposed to this express delegation of power and authority by the Legislature to the City of Chicago with respects to streets, I am unable to find anywhere in the Act under which the Sanitary District is organized, or the acts amendatory thereof, any express delegation to it by the Legislature of any power over streets.

As I understand your position, you do not contend that the Legislature has expressly delegated to the Sanitary District any control of or right in the streets of the city, but that such right in the district exists by implication, by reason of Section 6 of your Act reading as follows:

“That the power made available by the works constructed under the provisions of this act shall be converted into electrical energy and shall be transmitted to the various cities, villages and towns within said Sanitary District, or adjacent to the main channel of said Sanitary District, and may be used in lighting of said cities, villages and towns, or parts thereof, or for the operation of pumping plants or machinery used for municipal purposes or public service, or may be disposed of to any other person or corporation upon such terms and conditions as may be agreed to by said Sanitary District; *provided, however, that it shall be the duty of said Sanitary District to utilize so much of said power as may be required for that purpose to operate the pumping stations, bridges and other machinery of said Sanitary District,*”

and that, owing to the fact that the duty is imposed by the Legislature upon the district “to utilize so much of said power as is required to operate its own machinery,” under the rule that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the objects of the grant, the Legislature must have intended, by implication, to confer upon the district the right to occupy streets with conduits and wires necessary to transmit such electrical energy from one point of its works to another.

The act of the Legislature, as I understand it, whereby it is assumed such power is granted, is the Sanitary District

Act, which was passed subsequent to the Cities, Villages and Towns Act.

In order that such power shall exist by implication, it must be that the latter act relied upon to confer such power is so inconsistent with the former act that they both can not stand, and that thereby the latter act operates as a repeal of the former act in this respect.

As to repeals by implication our Supreme Court has said:

“It is the duty of the courts to construe them (statutes) so as to avoid repeal, if such a construction can be given, and a statute will never be held to be repealed by implication if it can be avoided by any reasonable hypothesis.”

Village of Ridgeway v. Gallatin County, 181 Ill., page 525 of opinion, and numerous cases there cited.

It is therefore clear that the necessity which compels us to resort to the doctrine of repeal by implication is the clear inconsistency between the two acts, and I can not see wherein such clear inconsistency appears, inasmuch as the Sanitary District, as any other distinct and separate corporation, can acquire the privilege it desires by compliance with the statute and ordinances of the city relative thereto, and that thereby both acts can stand and both be enforced by the courts.

It must be conceded, I take it, that if there is any express provision in the Drainage Act whereby the district is directed to do this work in any particular manner, such direction must be observed and followed by the district in exclusion to any other, and this notwithstanding the fact that compliance with such provision may, in the judgment of the officials of the district, involve what may be considered by them useless expense and delay. This, of course, would also remove any question of a resort to repeal by implication.

Recurring to your statement and contention that the laying of this conduit is necessary in order to permit the district to carry on its work of a public character, I would respectfully refer to Section 17 of the Act, which provides:

“When it shall be necessary in making *any* improvement which any district is authorized by this act to make, *to enter upon any public property or property held for public use,*

such district shall have the power so to do, and may acquire the necessary right of way over such property held for public use in the same manner as is above provided for acquiring private property, and may enter upon, use, widen, deepen and improve any navigable or other water, waterways, canal or lake; provided, the public use thereof shall not be unnecessarily interrupted or interfered with, and that the same shall be restored to its former usefulness as soon as practicable; . . .”

It appears to me that Section 17 covers and applies to the situation now before us, and if so it is well settled that when a municipal corporation is vested with a certain power or authority, and the mode for the exercise of such power or authority is prescribed, such mode so prescribed must be followed to the exclusion of any other.

It further follows, therefore, that the Sanitary District being a municipal corporation, and the mode in which it shall exercise its powers being expressly prescribed, such mode must be followed by it, and that the City of Chicago being also a municipal corporation, the same rule would apply to it, and following this rule to its logical sequence it must be clear that in the event of there being no power conferred upon the City of Chicago to permit the use in question — and I can find none — the City of Chicago has no right to grant to the Sanitary District the privilege to occupy the streets in question, except upon compliance by the Sanitary District with the provisions of the Cities, Villages and Towns Act and the Sanitary Act relative thereto.

It may be suggested that the City of Chicago should grant this privilege upon a consideration of public convenience, but with reference thereto it has been well said by our Supreme Court, in the Kreigh case above referred to, page 407 of opinion:

“A municipality can not by its acts alone invest itself with a power not conferred, or divest itself of a power which the charter confers.”

I am therefore constrained to express myself of the opinion that the city has no right to grant to the Sanitary District

the use of the streets requested in your letter, except upon compliance with the conditions above set forth.

Yours very truly,

OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

CHICAGO, MAY 15, 1907.

L. E. GOSSELIN, Esq., Deputy Comptroller, Chicago.

Dear Sir:

Referring to your recent communication asking for an opinion as to whether the city, on payment of the principal of a special assessment bond, where there is interest still remaining due and unpaid on such bond, can demand the surrender of it by the owner, I beg to advise you as follows:

The theory of the statute is that interest-bearing bonds may be issued to anticipate the collection of the second and succeeding installments of the assessment. These bonds bear interest at a fixed rate per cent, and the installments against which they are issued carry a corresponding rate of interest, so that a fund may be created sufficient to discharge the bond and interest.

The Supreme Court has held in *The People ex rel v. City of Chicago*, 152 Ill., 546 at p. 554, that the contractor is as much entitled to the interest that the contract calls for as he is entitled to the principal sum that his contract and voucher demand.

To the same effect is *Town of Cicero v. Green*, 211 Ill., 241 at p. 247. In the latter case it is held that in the case of a partial payment upon an interest-bearing obligation exceeding the interest, the payment is first applied to satisfy interest due and the balance should be applied on the principal.

In *City of Chicago v. The People*, 215 Ill., 235, at p. 239, it is held that under the statute the several installments shall

bear interest from their date until maturity, and that they shall also bear interest until paid.

In *Village of Wilmette v. The People*, 214 Ill., 207, at p. 111, it is held that, special assessment vouchers are creatures of the statute and are issued and received in pursuance of statutory provisions, and the holders and owners thereof are chargeable with notice of such provisions of the statute as fully as if set forth and at large in the vouchers and each of them. The court also says that the city is but an instrumentality selected by the law to receive payment of the assessments from the property-owners, and to pay the same to the holder of the vouchers, and that the property-owner is not required by law to withhold payment of the assessment until the voucher becomes due, but has, by law, the option to pay at any earlier date and thereby acquit himself of the burden of further payment of interest. The court concludes that it is the duty of the bondholder to ascertain when there is money in the city treasury applicable to the payment of the vouchers held by him, and to present the vouchers for payment. The interest, the court says, which the holder of the voucher is entitled to receive is that which the statute requires the property-holder to pay in order to discharge the lien against his property. If, however, the deficiency in interest arises from the payment by the property-owner of his assessment before the maturity of the paper issued against it, and the holder of the paper fails to present the same to the city for payment, but allows the fund to lie idle in the treasury, such holder can not enforce the levy of a supplemental assessment to make up such deficiency.

It is my opinion therefore, that interest is as much a part of the indebtedness as the principal sum itself, and that such interest runs after maturity and until paid. A bondholder, therefore, is not required to surrender the evidence of his indebtedness until the full amount of the principal and interest has been paid.

The form of endorsement proposed by Mr. John M. O'Connor to you in his letter under date of March 1, 1906, might be used as therein suggested, or you might take a receipt from the bondholder evidencing the amount of the

payment to him by the city. This receipt might be kept in the files of the Comptroller's office and would show the nature and amount of the payment.

Yours very truly,

EDWARD J. BRUNDAGE,
Corporation Counsel.

MAY 17, 1907.

M. O. HECKARD, M.D., Health Department.

Dear Sir:

Replying to your inquiry of recent date, I beg to advise you:

First. I do not find anything in the Revised Municipal Code which would prevent a man from ADVERTISING himself as an undertaker, by sign, card or otherwise, although he might not have a city license.

Second. I do not find anything in the Revised Municipal Code which would prevent a corporation from ADVERTISING and holding itself out as an undertaker.

Third. Section 1236, Article 22, of the Code, provides that it shall be unlawful for any person TO ACT as an undertaker, etc., WITHOUT FIRST obtaining a license.

Section 1237 of the same article provides how that license is to be obtained, and what the qualifications of the applicant must be.

Section 1240 provides that no person, unless he is a licensed undertaker, shall be permitted to MANAGE OR CONTROL ANY UNDERTAKING ROOM, store, etc.

By a careful examination of the foregoing sections you will readily see that the Code prohibits the ACTING as an undertaker and the management and control of undertaking establishments without a license, but a man might advertise as an undertaker, and if he did not in fact endeavor to prepare dead bodies for burial or cremation, or undertake the management of a funeral, I do not think it would be held that he had violated the municipal ordinances governing this matter.

This interpretation absolutely precludes any thought that a corporation could act as an undertaker, because the service to be rendered is of a personal nature and can only be rendered by one possessing the requisite qualifications prescribed in Section 1237, and, to use the language of the ordinance, he must be a "fit person."

Fourth. Notwithstanding the foregoing, however, the city would appear to be amply protected under Section 1240 against the hypothetical case which you suggest — where an applicant has been unsuccessful in his examination and has failed to secure an undertaker's license, and would then incorporate with a qualified person and proceed to advertise himself as an undertaker. This section says that "no person other than a licensed undertaker shall be permitted to manage or control any undertaking room," etc., "or to prepare dead bodies," etc., "or to manage or conduct funerals," etc., which you will note is, as heretofore indicated, a personal service, and can not therefore be delegated. Neither does a corporate existence in anywise mitigate against the enforcement of this provision, as is clearly shown by the conclusion of this section, which indicates that an assistant may be secured BY A LICENSED UNDERTAKER, under certain terms and conditions. A corporation not being able to secure a license could not, of course, secure an assistant, and I believe the city is fully protected in this matter.

Our only suggestion can therefore be that where corporations are advertising and holding themselves out as undertakers it is the duty of your department to see that the ACTUAL SERVICE is being rendered by men who are duly licensed or by assistants of such duly licensed undertakers, who have themselves fully complied with the special provision set out in Section 1240.

If you feel that the work of your department is embarrassed, or that you are handicapped in the enforcement of the ordinance as it now stands, because corporations are permitted to hold themselves out as undertakers, I would be very glad, indeed, to prepare an amendment to Article 22 of the Revised Code, and insert the same provision as is in the State statute

relative to embalmers, which makes it illegal for any one to "hold himself out as practicing the art of embalming."

With sincere regards, I am,

Yours very truly,

EMIL C. WETTEN,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

MAY 21, 1907.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

I am in receipt of yours of May 18, stating that, in the wrecking of certain buildings, the insurance companies, in addition to insuring the workmen on the building, are indemnifying the city by bond running to the contractor, in the event of any passerby being injured; and that the contractors contend that this is adequate protection for the city from all liability; and that no additional bond should be required of them.

Section 229, Revised Municipal Code, provides that permits must be obtained from the Commissioner of Buildings for the erection, enlargement, alteration, repair or removal of any building.

In Section 234 it is further provided that any applicant for such permit

. . . "shall produce evidence that he has filed with and had approved by the Commissioner of Public Works of the City an indemnifying bond protecting the City against any and all damage that may arise to the streets or alleys upon which such building abuts, and to the City and to any person in consequence, or by reason of, the proposed operations, to be authorized by such permit, or by reason of any obstruction or occupation of any street or sidewalk in and about such building operations."

As I understand it, the contractors in question have offered as a substitute for the bond required by the section last quoted, the obligation of an insurance or casualty com-

pany running to themselves. Whatever may be the conditions of such an instrument, I am unable to see how the City could take advantage of the same, or how it would be protected from liability caused by the wrecking company in question.

I am, therefore, of the opinion that the Commissioner of Public Works should, through the proper agency, continue to exact from the holder of the wrecking permit an indemnity bond, protecting the city against all damages that may accrue against it, as provided by the ordinance quoted.

Yours very truly,

WILLIAM K. OTIS,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

Assistant Corporation Counsel.

MAY 22, 1908.

FRANK I. BENNETT, Esq., Chairman, Finance Committee.

Dear Sir:

In replying to your favor of the 5th inst., addressed to Hon. Edward J. Brundage, Corporation Counsel, wherein you ask for an opinion upon various questions relative to the sale of power by Sanitary District, I will take up the questions separately.

First. As to an interpretation of the law covering the sale of power to municipalities drained by the district in relation to the amounts to be charged said municipalities.

This subject is covered by Section 6 of the Sanitary District Act of 1903, reading as follows:

“That the power made available by the works constructed under the provisions of this act shall be converted into electrical energy, and shall be transmitted to the various cities, villages and towns within said sanitary district or adjacent to the main channel of said sanitary district, and may be used in the lighting of said cities, villages and towns, or parts thereof, or for the operation of pumping plants or machinery used for municipal purposes, or for public service, or may be disposed of to any other person or corporation upon such

terms and conditions as may be agreed to by the said Sanitary District; provided, however, that it shall be the duty of said Sanitary District to utilize so much of said power as may be required for that purpose to operate the pumping stations, bridges and other machinery of said Sanitary District."

From a reading of this act it seems clear that the matter of the sale of electrical energy by the Sanitary District to municipalities *or others* is placed upon a private contract basis; that is, the price to be charged is a matter of mutual agreement between the parties.

It might further be suggested that a reading of the act will also disclose the fact that no municipality thereunder could compel the Sanitary District to furnish such power; that it is optional with the Sanitary District, after "utilizing so much of said power as may be required for the purpose of operating the pumping stations, bridges and other machinery of said Sanitary District," to dispose of the surplus either to municipalities within said Sanitary District or adjacent to the main channel, or to dispose of the same to any other person or corporation, leaving it entirely within the discretion of the Sanitary District to dispose of the same only upon such terms as they are willing to accede to.

Second. What items should be considered in arriving at the cost of such power?

The answer to the first question covers this, inasmuch as the price to be charged is purely a matter of mutual agreement between the parties.

Third. An opinion as to the necessity for frontage consents for transmission lines.

This question has heretofore been the subject of careful investigation by this office, and I attach hereto copy of opinion rendered by Mr. George W. Miller of date August 6, 1907, and copy of opinion rendered by Mr. Emil C. Wetten of date June 1, 1907, which go into this question exhaustively, and you will note they both arrive at the conclusion that such frontage consents are necessary.

Fourth. As to the right of the city to take over power obtained from the Sanitary District and dispose of it commercially.

The city has no power to do this. The city would undoubtedly have the right in the event of its ownership of a city lighting plant to dispose of any energy produced by said plant in excess of that required for city purposes, but I am clearly of the opinion that the city has no right to go into the market, purchase a commodity and traffic in the same at a profit.

Yours very truly,

OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

MAY 25, 1907.

L. E. GOSSELIN, Esq., Deputy Comptroller.

Dear Sir:

We return herewith five vouchers, A331, 333, 329, 327 and 341, issued by the Board of Local Improvements and charged to its appropriation for 1907.

These were transmitted by you with a request to be advised whether or not the City Comptroller has the right to pass for payment vouchers of this character.

We are not certain that we understand the facts in these particular cases, but we assume that these vouchers are issued upon special assessments heretofore levied by the city against certain properties belonging either to the school board or some one of the various park districts of the city; that the assessments were not paid, that one of the properties was declared to be sold to the city for delinquent assessment, and a certificate of sale issued and delivered to the city, that the purpose of the item in the appropriation ordinance for this year is to enable the city to add to the fund derived from these special assessments a sum sufficient to make good any existing delinquency.

It is not every piece of property belonging to the school board that is exempt from special assessment, but only those

tracts of land that are located in Section 16 or that were purchased with the proceeds derived from the sale of some part of Section 16. If the record fails to show that the land involved is in Section 16, or that being in some other section it was purchased with the proceeds of Section 16, it is subject to special assessment and tax just as the property of an individual is.

Chicago v. Chicago, 207 Ill., 37.

Grosse v. People, 218 Ill., 342.

If the property involved is a part of Section 16, or was purchased with the proceeds of that section, then, of course, the assessment is a nullity.

Lands owned by the park districts in the city are not subject to special assessment, and any assessment levied against them is a nullity.

The city is not permitted to use its general revenue for the purpose of making good any deficiency or delinquency in a special assessment (*Chicago v. Breede*, 218, Ill., 520), and it can not escape this rule by attempting to make good any delinquency growing out of an effort to assess property that is not subject to assessment.

In the case in which the city has obtained a tax certificate we think it competent for the city to provide a fund out of which it can place in the special assessment fund an amount equal to the assessment levied against that property, but of course this can not be done if that particular property was not subject to assessment.

The contractor and bondholder contract that they will look to the special assessment fund for their reimbursement, and not to the general fund, and if there is any delinquency it is their misfortune, for which the general taxpayers ought not to be made to suffer.

Yours truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

MAY 25, 1907.

JOHN J. HANBERG, ESQ., Commissioner of Public Works.

Dear Sir:

I am in receipt of attached notice, served on you by George W. Thomas, to the effect that the destruction of the sidewalk in front of lots 13 and 14 in the re-subdivision of lots 31 to 39, and parts of lots 30 and 40, in Thomas' subdivision of block 87, in Canal Trustees' subdivision of the W. $\frac{1}{2}$ of Section 27-39-14, is in violation of city ordinances. I am advised that the two lots specified in the notice are located on Twenty-eighth street *under the South Side Elevated Railroad, which has condemned its right of way over the same.*

Section 15 of an ordinance adopted March 16, 1903, authorizing the South Side Elevated Railroad Company to construct an additional track, imposes the following as a condition of such grant of authority:

"The privileges by this ordinance vested in said South Side Elevated Railroad are granted upon the express condition and agreement that said company shall and will pave with asphalt, and maintain the same in good condition and replace the same when ordered by the Commissioner of Public Works, during the life of this ordinance . . . not only its own right of way from Twelfth street to Fortieth street, thence east and south to Forty-third street, but also the north and south alleys adjacent to said right of way thereby authorized to be used by said company, *and that it will keep its right of way at all times free and unimpeded* and open for public travel, except by its columns, stairways and appurtenances requisite and convenient for its elevated railroad, and the proper care and repair thereof."

The Company is now proceeding to carry out its agreement to pave the right of way referred to. Mr. Thomas denies its authority to pave the surface of his lots, and wishes the city to cause to be replaced at the Company's expense sidewalks removed or destroyed in front of his lots in carrying on the paving operations.

It appears that, in accordance with the above ordinance, a permit was granted by the Superintendent of Streets, allow-

ing the Company to pave its right of way and the adjacent alleys between Twelfth and Fortieth streets. While the Company can not be said to have the "right of way" over public streets and sidewalks, it would seem, under the language of the above ordinance and permit, that if it has authority under the same to pave the *surface* of its right of way, as acquired by condemnation, it must also have, by implication, a right to build and pave driveways across intersecting sidewalks and curbs, and if necessary, remove the latter for that purpose. A restriction on the manner in which this may be done appears in Section 2067 of the Revised Municipal Code, requiring that where driveways are to be built across sidewalk space they shall conform to the sidewalk grade.

As to the surface rights of the Company on property acquired from Mr. Thomas by condemnation, it appears that said Company is incorporated under the general Railroad Act of 1872, and that the Supreme Court has held in *Lieberman v. Chicago Rapid Transit Company*, 141 Ill., 140, that this same Company, having been incorporated under that Act, acquired authority to construct a railroad in the general sense of the word.

It also appears from the ordinance above quoted that the Company was authorized to build its additional track only on the express condition that said Company pave the surface of its right of way. From which it would seem, that in condemning the property to be occupied by such additional track, the Court must have contemplated such a taking by the Company as would enable it to fulfill its agreement with the City. I have not seen a copy of the judgment in condemnation against this property, but unless it strictly limits the rights of the Company on the surface to the erection of pillars for the superstructure, I am of the opinion that it is at least a doubtful question whether the right of way of the Company does not include the surface of the lots.

I am therefore unable to see why the City should assume that the railroad is without sufficient rights on the surface of this property to pave the same in accordance with the permit issued to it. Until the question is definitely settled between Mr. Thomas and the Company, I do not think your depart-

ment should interfere with the latter in the removal by it of sidewalks, so far as this is necessary in carrying on its paving operations under the ordinance.

Yours very truly,

WILLIAM K.-OTIS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

MAY 28, 1907.

FRANK I. BENNETT, ESQ., Chairman Finance Committee.

Dear Sir:

Replying to communication from your Committee of May 11, 1907, for opinion relative to the liability of the city to the claim of Mr. W. C. Wayman for damages to the amount of \$1,500.00 for destruction to building owned by him at 88 North Washtenaw avenue, on March 25, 1907, I beg leave to report. The facts are substantially as follows:

It appears from the records of the Department of Health, upon complaint being made, that on February 28, 1907, said department caused a notice of vacation and condemnation to be served on Kozminski & Yondorf, agents for the owner, at 75 Dearborn street, and also caused a similar notice to be posted on said premises, that said building has been condemned as unfit for human habitation, and notice to them as owner or agents, that in accordance with Section 1067, Chapter 32, of the city ordinances, to have said premises vacated within ten days from date; that subsequently the time was extended to May 1, 1907.

It appears further that pursuant to said notice the building was vacated some time during the latter part of March, 1907, and practically abandoned by the owner. It appears also that the building is within the fire limits of Chicago; that for a long time the building was the rendezvous for disreputable characters, and was a nuisance to the neighborhood and of no value whatever; and that complaint had been made at the Warren avenue police station several days before March 25, 1907, that the building was being torn apart and

boards carried away, and was in a dangerous condition and liable to collapse; that the police were on duty day and night to keep people away; that on March 25, 1907, the Building Department was notified by the Chief of Police that the building was dangerous and liable to fall, whereupon Mr. George C. Knight, Deputy Building Inspector, repaired at once to the premises and upon examination found the building entirely gutted; the doors, windows and all the plumbing gone; that the lower part of the building had been removed and the upper part held up by several 2 by 4 scantlings; that what remained of the building was likely to fall at any moment; that the Fire Department was ordered to tear down what remained of the same, which was accordingly done.

Paragraph 75, Section 62, Article V, Chapter 24, Hurd's Revised Statutes of Illinois, 1906, gives the city the power to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

Paragraph 205 of Article I, Chapter XV, Revised Code 1905, relating to buildings, in part reads as follows:

"If the commissioner of buildings shall find in the city any building or structure or part thereof in such an unsafe condition as to endanger a life, *but so that, by the immediate application of precautionary measures such danger may be averted*, he shall have authority, and it shall be his duty, to forthwith notify in writing, the owner, agent, or person in possession, charge or control of such building or structure or part thereof, to adopt and put into effect such precautionary measures as may be necessary or advisable in order to place such building or structure or part thereof in a safe condition. Such notice shall state briefly the nature of the work required to be done, and said commissioner shall specify in such notice a time within which the work required to be done shall be completed by the person notified, such time to be fixed by said commissioner upon taking into consideration the condition of such building or structure or part thereof, and the danger to life or property which may result from its unsafe condition."

and further,

“If, in accordance with the provisions of this section the work of placing any building or structure or part thereof in a safe condition shall devolve upon the said commissioner, and it shall appear that such building or structure or part thereof is in such a condition as not to warrant the expenditure thereon of a sufficient sum of money to make such repairs or to do such work as is necessary to put it in a safe condition, the said commissioner shall have authority to tear down or destroy such building or structure or part thereof, and the expense of tearing down and destroying any such building or structure or part thereof and the expense of making any repairs or doing any work thereon shall be charged to the person owning or in possession, charge or control of such building or structure or part thereof, and the commissioner shall recover or cause to be recovered from such owner or person in possession, charge or control, the cost to the city of doing such work.”

Paragraph 646 of Article XVII of said Chapter, relating to frame buildings, reads:

“It shall not be lawful to repair or reconstruct or remove any frame building which has been injured more than fifty per cent of its original cost by wear and tear, by the effects of the element or by fire.”

and further, Paragraph 737 of Chapter 25 provides:

“Whenever, in the opinion of the commissioner of buildings, it shall be necessary *to tear down*, alter, repair or rebuild *any building*, or portion of any building, *which is dangerous, defective or unsafe*, or which is reported to the said commissioner by the commissioner of health to be unfit for human occupancy, or which has been built in violation of any of the provisions of this chapter or of any ordinance regulating the construction of buildings hereafter passed, said commissioner of buildings shall cause such building or such portion thereof to be torn down, altered, repaired or rebuilt or such work to be done thereon as he may deem necessary to render such building or such portion thereof safe or fit for human occupancy, and the expense thereof shall be recoverable from

the owner or owners of such building by any proceeding that may be deemed appropriate."

In this case it appears that the building was of no value whatever and was in such unsafe condition that no precautionary measures could be taken to avert the danger to life, and it clearly was the duty of the Building Commissioner, under the city ordinances, to order the building torn down at once.

In *Nazworthy v. City of Sullivan*, reported in 55th Appellate Court Reports, page 48, Mr. Presiding Justice Boggs, in discussing the case, said:

"The structure or the ruins of a structure described in the plea, situated, as it was, upon one of the principal streets of the city, unfit for human habitation or other lawful use, devoted to no use or purpose, a resort for tramps and disorderly persons, was a source of serious discomfort and annoyance to the public and of actual danger to useful and valuable property of the community within the range of its influence. It was within every definition of the term a public nuisance. It can not be said that it was the use made of the building that was the ground of offense, for it was not devoted by the owner or with his consent to any use and was unfit for use. The primary cause of public annoyance and danger was the decayed, dilapidated, ruined and abandoned condition of the building. Tramps frequented it because of its character, nature and condition. The city was vested with ample power to declare it a nuisance and to abate it as such. Subdivision 75, Sec. 63, Art. V, Chap. 24, Revised Statutes." and further,

"It is urged that the demolition of the building was illegal and unjustifiable. If the nuisance consisted of the use made of the structure, clearly the law would not justify the destruction of the building, but the cause of the offense should alone be removed. As we have seen, it was the nature, character and condition of the ruins of the building which created the nuisance. Hence the demolition of the structure itself was justifiable under the general grant of power given the city by the statute. Beach on Public Corporations, Vol. 2, Sec. 1022, and cases cited, Note 142. But it is urged that the

city had no power to demolish the building except in pursuance of the judgment of a court in the course of a legal proceeding instituted for that purpose. The doctrine announced by our Supreme Court in *King et al. v. Davenport, Ex'r.*, 98 Ill. 305, is here in point. It was there said: 'But the particular respect in which the ordinance is assailed is that it authorizes the abatement of the nuisance summarily and without prior adjudication of the right to exercise it.' The summary abatement of nuisances is a remedy which has ever existed in the law, and its exercise is not regarded as in conflict with constitutional provisions for the protection of the rights of private property. Formal legal proceedings and trial by jury are often inappropriate, and wholly inadequate in cases where public safety demands an immediate remedy."

In view of the decisions of our courts in construing the law, as bearing upon the facts as stated in this case, I am of the opinion that no legal liability attaches to the city of Chicago for alleged damages claimed by Mr. W. C. Wayman for the tearing down of the building in question, but on the contrary that the owner of the building is liable to the city of Chicago for any expense incurred in tearing down the same.

Yours very truly,

ROBERT R. JAMPOLIS,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 1, 1907.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

I am in receipt of your favor of May 21 asking for an opinion from this office on the question whether a party may maintain a "beer station" at 323 South Fifty-second avenue, formerly Robinson avenue, in the Town of Austin, and also if he may at such address be granted a license for that purpose.

It is not necessary to determine whether a wholesale liquor license or a dramshop license is required for the above purpose, since it is clearly illegal to sell liquor either at wholesale or at retail at the address named.

The territory including No. 323 South Fifty-second avenue was annexed to the City of Chicago April 4, 1899. At that time it was a part of the Town of Cicero and subject to the following ordinance of the Town of Cicero, which was adopted April 10, 1897:

“CHAPTER XXXV.

“DRAMSHOPS.

“311. Section 1. That no person, by himself, his agent or his servant, shall sell or give away any intoxicating, fermented, malt or vinous liquors, nor any liquor or beverage containing alcohol, within the town of Cicero; provided, that the provisions of this ordinance shall not apply to the selling of any intoxicating liquors by any apothecary or druggist in said town for medical, mechanical, sacramental or chemical purposes.”

Section 18 of the “Annexation Act,” adopted by the legislature April 25, 1889, and found in Hurd’s Revised Statutes, Chapter 24, Section 228, provides that all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dramshops is prohibited or regulated, shall be continued in full force and effect.

That the above section applies to the sale of liquor at wholesale as well as at retail has been decided by the Supreme Court in the cases of *The People ex rel Krause v. Harrison et al.*, 191 Ill., 257. It was there held that the provision of Section 18 above referred to, preserving in full force all ordinances of the annexed territory, “whereby the licensing of dramshops is prohibited or regulated,” means all ordinances entitled dramshops, and which were enacted to license and regulate the sale of intoxicants.

I am therefore of opinion that the sale of liquor in any form or manner at the address named above is in violation of

the ordinance of Cicero adopted April 10, 1897, which is still in full force and effect by virtue of the Annexation Act.

Yours truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
Second Assistant Corporation Counsel.

JUNE 1, 1907.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

In the matter of the application of the Sanitary District of Chicago to erect poles and wires upon certain streets named in said application, for the purpose of transmitting electrical energy to the villages of Evergreen Park, Morgan Park and Blue Island, I beg to advise you that I do not consider the application in legal form, and you are therefore not justified in granting the permit.

The Revised Municipal Code provides (Section 2166):

“No person or corporation shall erect, construct, maintain or use any pole, line or wire, or electric conductor of any description whatever within the city, **WITHOUT FIRST HAVING OBTAINED A PERMIT THEREFOR, UNDER A VALID AND EXISTING ORDINANCE**, from the commissioner of public works, which permit shall be countersigned by the city electrician, under a penalty of one hundred dollars for each and every offense; and each and every day any such telegraph pole, line or wire, or electric conductor, shall be maintained or used after the first conviction shall constitute a new and separate offense.”

No such “valid and existing ordinance” has been passed, and neither can it be passed except by a full and complete compliance with Section 186, Chapter 24, Cities and Villages Act (Starr & Curtis Revised Statutes), which provides:

“That the city council in cities, or the president and board of trustees in villages and incorporated towns, shall have **NO POWER** to pass an ordinance granting to any person or corporation the right or privilege to lay any gas pipes

for the distribution of inflammable gas for fuel or lighting purposes, OR TO PASS AN ORDINANCE GRANTING TO ANY PERSON OR CORPORATION THE RIGHT OR PRIVILEGE TO LAY IN OR ON THE GROUND, OR STRING ON POLES ANY WIRES, ON, OVER OR BY WHICH ELECTRICITY FOR LIGHTING PURPOSES IS TO BE USED, conveyed or distributed in any street, alley or public grounds in any such city, village or incorporated town, except upon the petition of the owner of the land representing more than one-half of the frontage on the street or alley, or so much thereof as is sought to be used for the purposes above mentioned, or any or either of them, and when the street or alley, or part thereof sought to be used shall be more than one mile in length, no right or privilege to lay pipes, or lay or string wires for lighting purposes, shall be granted, unless a petition therefor shall be presented to the city council of the city . . . in which such right or privilege is sought, signed by the owners of the land representing more than one-half of the frontage of each mile, and of the fraction of a mile, if any, in excess of the whole mile, measuring from the initial point named in such petition of such street or alley, or of the part thereof sought to be used for the purposes above mentioned, or either of them."

You will therefore note that it is impossible for you to issue a permit unless a "valid and existing ordinance" has been passed by the City Council authorizing the location of the poles, and further, that the City Council is without authority to pass such an ordinance without a petition, attached to the application for such ordinance, of the owner of the land representing more than one-half of the frontage on the street or alley upon which the poles are to be placed.

In this connection I am advised, however, that the Sanitary District contends that, in view of the fact that they are a municipal corporation, the provisions of said clause 186, chapter 24, do not apply to them, and that they are entitled to the permit without the passage of the ordinance. If they are entitled to the permit without the ordinance, they are undoubtedly entitled to proceed without the permit. But I am positive that in this contention they are in error.

Section 63, Chapter 24, Clause 90, Cities and Villages Act, grants to the City Council the power TO REGULATE THE USE OF THE STREETS, which would seem on its face to give the City Council full and complete power to provide by ordinance for the use of the public streets in any manner they saw fit, provided there was not an abuse of that power, and provided, further, that the grant of such use did not deprive the inhabitants of the city of the right of free passage over, upon and across such streets. But our Supreme Court has held that paragraph 9, granting to the City Council the right to regulate the use of the streets, has had a definite limitation placed upon it by clause 90 of Section 63, Chapter 24, which reads as follows:

“The city council or board of trustees shall have NO POWER to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the State now or hereafter in force, EXCEPT UPON THE PETITION OF THE OWNERS OF THE LAND REPRESENTING MORE THAN ONE-HALF OF THE FRONTAGE OF THE STREET OR SO MUCH THEREOF AS IS SOUGHT TO BE USED FOR RAILROAD PURPOSES.”

(*Chicago Dock and Canal Co. v. Garrity*, 115 Ill., 155.)

The Sanitary District when engaging in the business of selling superfluous electricity must be held to be acting as a private corporation, and not as a municipal corporation, on the same principle as the city of Chicago when engaging in the business of supplying water to its inhabitants. Being engaged in a private business, the fact that they are a municipal corporation does not give them any greater or better rights than if they were a private corporation, and if it should be held that the Sanitary District has a right to place poles upon and along the public streets of the City of Chicago, under a permit which is not authorized by a “valid and existing ordinance” passed by the City Council in accordance with Section 186, Chapter 24, Cities and Villages Act, then the Sanitary District would have a perfect right to build a

steam, dummy, electric, cable, horse or other railroad upon the streets of Chicago under a like permit, and without securing the necessary frontage consents as provided in Clause 90, Section 63, Chapter 24, Cities and Villages Act, in order to sell the superfluous stone which is located along their right-of-way and which is not necessary in order to operate and maintain the canal, and be able to deliver that stone to their customers within the city limits of Chicago or, perchance, to some suburban town beyond the limits of the City of Chicago.

I do not think the Sanitary District will contend for a single moment that they would have the right to build such a railroad; even if the Legislature had passed an enabling statute; and yet Clause 90, Paragraph 63 of Chapter 24 and Paragraph 186 of Chapter 24 are framed along identical lines and absolutely prohibit the City Council from passing the necessary ordinance until they have the frontage consents,—the only difference being that in Paragraph 186, relative to electric light poles, it specifically provides that the owner of any lot fronting on any street or alley may enjoin a person or corporation from using such street or alley unless proper frontage consents have been secured.

I am not now prepared to agree with the contention of the District, that, because the statute empowering the Sanitary District to develop electrical energy authorized that it “SHALL” be transmitted to the various cities, it meant to give to the District carte blanche authority to violate any and all existing statutes in order to transmit their electrical power with as little trouble and expense as possible.

I do not think that Section 186 has been repealed by implication, because it is not inconsistent with the act authorizing the District to sell their superfluous electrical energy, and both might well stand without any great harm or injury coming to the Sanitary District.

Repeals of statutes by implication are not favored by law, and a later statute will never be held to operate as a repeal of an earlier statute unless the two are so inconsistent or repugnant that they can not be reconciled, and it becomes the duty of the courts to so construe them as to avoid such repeal by implication in all cases, if such a construction can be

reasonably adopted. (*Hunt v. Chicago Horse & Dummy Railway*, 121 Ill., 638.)

I am, therefore, forced to conclude that if the Sanitary District has the power they contend for under the statute, they do not require a permit of any kind from the city, but if they do require such a permit, then the city of Chicago has "NO POWER" to grant such a permit without a "valid and existing ordinance" passed on the petition of the owner of the land representing more than one-half of the frontage on the street or alley or so much thereof as is sought to be used for the purposes above referred to.

Yours very truly,

EMIL C. WETTEN,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 4, 1907.

HOMER K. GALPIN, Esq., Clerk of the Municipal Court.

Dear Sir:

This department is asked by you for an opinion as to whether a police officer causing the arrest, prosecution and conviction of a violator of paragraph 371 (section 223) of the Criminal Code is entitled to receive one-half of any fine paid under that section of the code.

This section of the code provides for fines of "not less than \$100.00 nor more than \$1,000.00 for each offense," for a violation thereof, and the language under which a portion of this fine may be claimed by an informer is:

"One-half of said fine to be paid to the informer upon whose evidence the person so offending shall be convicted, and one-half to the school fund of the county in which the said conviction is obtained."

In *Clinton County Commissioners vs. Davis*, 64 L. R. A. 780, a vote buyer sued to recover a reward for furnishing evidence to convict vote sellers under an Indiana Statute and

in the course of its opinion the Supreme Court of that State announced this general doctrine (p. 784) :

“Courts in construing offers of reward made for the apprehension of persons charged with crime, have uniformly held that a ministerial officer, who, in the performance of his duties as such, apprehends the criminal, is not entitled to the reward. And in cases where rewards have been offered for the return of stolen property, it has been held that the sheriff or other peace officer, who secured the property and returned it to the owner, is not entitled to the reward, even though the offer was general to all persons. This is upon the ground that it is against public policy to allow a public officer, for the discharge of his duties, any compensation except that fixed by law.”

In *Lees vs. Colgan*, 40, L. R. A. 355 (120 Cal. 262), a police captain arrested a murderer and claimed a reward offered by the governor under authority of a statute of that state. It was held that he was not entitled to recover the reward, and in the opinion this language was used :

“Was it the official duty of this captain of police to make the arrest of the criminal? And, if so, is it against sound public policy to allow such an officer to receive a reward for the performance of his duty?

“The last legal proposition stated must be declared in the affirmative. The courts, both in this country and England, are practically unanimous in declaring that a public officer working for a fixed compensation, or whose fees are prescribed by law, can not demand or contract for a reward for services rendered in the line or scope of his official duty.”

Our own Supreme Court in *Hogan vs. Stophlet*, 179 Ill., 150, where a sheriff sought to recover a reward for the arrest and conviction of one whom it was his duty to arrest, said (p. 156) :

“It is against public policy to allow a man to recover a reward for doing his duty as a public officer. It is also against public policy and illegal for the sheriff to receive for services, for which fixed compensation is prescribed by law, any other or further fees, although extraordinary diligence may have been exercised by him in the discharge of his duty.”

These cases are in line with the general current of authority. They deal, however, with rewards offered in individual cases, while the question here involved is the right of a police officer to take, as an informer, a portion of a fine under the terms of a statute.

In 16 American & English Encyclopedia of Law, page 326, in the chapter on informers, the author of that chapter says:

“And apart from any such statutory provision, officers of the government can be considered informers only where they incidentally *and not in the direct prosecution or course of their duty*, or under a special retainer to investigate the matter, acquire information useful to the government.”

In Harris vs. Beaven, 11 Bush (Ky.), 254, a statute read:

“Whoever shall cause himself to be entered as a prosecutor on any indictment under these sections (i. e., sections 6 and 7 of chapter 42), and stand responsible for the costs, shall be entitled to one-half and the prosecuting attorney shall be entitled to one-fourth, but no prosecutor shall be deemed necessary.”

The public prosecutor entered himself as a prosecutor on an indictment under this statute and claimed the right to recover, in addition to the one-fourth provided for his compensation, the one-half provided to be paid the person entering himself as prosecutor under the statute.

In holding that he was not entitled to recover the one-half under the statute, the court, among other things, said (p. 257):

“Section 1, Article 4, Chapter 4, Revised Statute, provided, that commonwealth’s attorneys should attend each Circuit Court held in their respective districts and prosecute all infractions of the Criminal and Penal Laws therein and discharge all other duties assigned to them by law. For the services thus rendered these officers were allowed a fixed salary, payable out of the Treasury, and a certain per cent of all fines and their vouchers in cases in which they prosecuted the pleas of the commonwealth. Having thus provided what was deemed suitable compensation, did the legislature

intend by enacting Section 8, Chapter 42 *supra*, to enable commonwealth's attorneys, by entering their own names on indictments as prosecutors, to secure to themselves, in addition to the compensation otherwise provided, the compensation given by that section to prosecutors? We think not. The object had in view, no doubt, was to bring private individuals to aid the prosecution, by offering as an inducement a part of the fine. It was the duty of the commonwealth's attorney to do all that he could reasonably and fairly to secure the conviction of Harris, for the salary and perquisites given him as such; and, when he became prosecutor, he came under no new obligation to the State in the prosecution of the case, and could not lawfully render any services therein which he was not bound to render before assuming the relation of prosecutor."

It was said by this court in *Marking vs. Needy and Hatch, etc.* (8 Bush 22) :

"That a reward offered for the arrest of one charged with the commission of a crime could not be claimed by a public officer, whose sworn duty it was to make the arrest; *a fortiori*, the reward offered by statute to one who becomes a prosecutor in a case like this under consideration can not be claimed by a public officer whose sworn duty it is to prosecute for the compensation provided for him as a prosecuting officer."

It will thus be seen that the same rule of public policy which prohibits a public officer from recovering a reward offered in an individual case for the doing of that which was his duty applies where a public officer under like conditions seeks to recover, as an informer, a portion of the fine under a statute. Where the thing done by the public officer, for the doing of which he seeks to claim a reward offered or to claim as an informer a portion of a fine, was done in the line of his duty as such officer, then under the authorities on grounds of public policy, he is not entitled to either.

Dealing now directly with the case in hand, this department has ascertained from an interview with Officer Wooldridge, that for the past five years he has been detailed to special work by the superintendent of police, to investigate

various "get-rich-quick" schemes, and to prosecute violators of the various sections of the Criminal Code, including the one in question, so that whatever he did as a police officer of this city in connection with the two cases in question he did in the performance of his duty as such officer. As a police officer he was paid a fixed salary, as compensation for his services, and therefore is not entitled to recover any portion of the fines in question.

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 5, 1907.

JOHN J. HANBERG, ESQ., Commissioner of Public Works.

Dear Sir:

I am in receipt of your request under date of May 22 for an opinion whether your department can legally enter on a dumping ground in the Fifth Ward, the same being private property, and fill up a hole in accordance with a council order passed May 13, 1905 (Council Proceedings, p. 232).

Referring to the above and to my conversation on Monday with Mr. Redieske, I beg to say that I have subsequently had an interview with Mr. E. R. Pritchard, secretary of the Health Department, who states positively that the hole in question has been declared a nuisance by that department, both in written and verbal conversations to Mr. Lynch, owner of the dump. He shows a copy of a letter sent April 23, 1907, to Mr. Lynch, requiring him to confine the dumping of refuse to those portions of the dump still below grade, to extinguish all fires, and to first fill the pond in the southeast portion of the dump. The letter also states that these orders were given to prevent the dump from being offensive to the community, and that unless observed the department would close the same altogether. I am also advised that the pond thus ordered filled is the same hole in regard to which the council order of May 13 was passed; that it contains stagnant water to a depth of ten feet or more, and is the source of bad odors

which pervade the neighborhood; that a horse was recently drowned there, and that the hole is clearly a nuisance which should be abated.

I also note from correspondence of Mr. Morron, President of the Diamond Glue Company, that his company objects only to the dumping of refuse in the immediate proximity of its plant, while the hole in question is at the extreme opposite end of the dumping ground. I call attention to these facts because it seems clear that the existence of a nuisance is the only cause for which the City would be authorized to enter upon private property for such a purpose as that under consideration.

One of the enumerated powers of the City Council derived by it from the Legislature is "to declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist." Revised Statutes, Chap. 24, Sec. 62 (75th).

There is no doubt as to the power of the City as such to enter upon private property to abate a nuisance. (See Abbott's Municipal Corporations, Sec. 138 and authorities cited.)

Section 1029, Revised Municipal Code, is as follows:

"It shall be the duty of the Commissioner of Health to enforce all the laws of the State and ordinances of the city and all rules and regulations of the department of health, in relation to the sanitary condition of the city, and cause all nuisances to be abated with all reasonable promptness."

Sections 1201 and 1206 provide the methods in which the Health Commissioner may give notice to owners or occupants of property to abate nuisances thereon, in default of which the Commissioner is authorized to take action himself. Summary abatement of nuisances without notice is also provided for in the discretion of the Health Commissioner by Section 1207. Nowhere is the Department of Public Works given authority to abate nuisances.

Under the circumstances above stated I am of opinion that the power to abate this nuisance by causing the pond hole to be filled lies only in the Commissioner of Health and

can not be vested in the Commissioner of Public Works by a mere order or by anything else than a general ordinance.

In the case of *People v. Village of Crotty*, 93 Ill., 180, the question of the power of the municipality to license dram-shops was at issue. The court said at page 181:

“It is clear that the legislature has given appellee the power to license, regulate and prohibit the sale of intoxicating liquors, but the mere grant of this power by the legislature would not of itself authorize the village authorities to issue a license. This power to license, regulate and prohibit is a dormant one and affords no authority to issue licenses until called into life and put in operation by appropriate legislation by the municipal authorities. Without the adoption of a *general ordinance* on the subject authorizing the issuing of licenses, and specifying who shall issue them, the length of time they shall run, the amount to be paid by the applicant, the time and manner of payment, etc., the village authorities are powerless to issue licenses to any one.”

The above rule is quoted and affirmed in *People v. Cre-gier*, 138 Ill., 401, at page 419; also in *People v. Mount*, 186 Ill., 560, at page 569.

It is well settled that the effect of a general ordinance can not be suspended by the adoption of an order or a resolution by the City Council.

Chicago & No. Pac. R. R. Co. v. City of Chicago, 174 Ill., 439.

I am, therefore, of opinion that your department is without authority to fill the pond hole in the Fifth Ward dumping ground under the council order of May 13, but that the matter was and still is within the province of the Department of Health.

Yours truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 18, 1907.

WINFIELD P. DUNN, Esq., Chairman License Committee.

Dear Sir:

By letter of date April 22 last, addressed to the Corporation Counsel, this department is advised that the Garfield Park Protective Association has asked for the construction of a dramshop ordinance passed by the Board of Trustees of the Town of Cicero, on August 28, 1880, appearing on page 736 of the Revised Municipal Code of Chicago, of 1905. And in your letter you state: "The point is whether saloons are required every year to present petitions signed by the majority of the legal voters within one-half mile of the place where liquor is to be sold before a license is again issued."

By this we understand you to mean that where one desiring a license to keep a dramshop files a petition, praying that a license be issued to him, signed by a majority of the legal voters residing within one-half mile of the place where liquors are proposed to be sold and upon such petition procures a license, may a new license be thereafter issued to him at the expiration of each license period upon presenting his application therefor without a petition so signed, or must each application for a license be accompanied by such a petition.

Subsequent to the adoption of the ordinance in question, and under date of June 17, 1889, a portion of the territory of the old town of Cicero was annexed to the City of Chicago and the inquiry, therefore, relates to the application of this ordinance to that portion of the territory of the town of Cicero now forming a part of the city.

Section 18 of the Annexation Act (Vol. 1 Starr & Curtis Rev. Stat. p. 805, par. 235) provides in part as follows:

"When a part . . . of an incorporated town, village or city is annexed under the provisions of this Act, to another city . . . and prior to such annexation, an ordinance was in force, prohibiting the issuing of licenses to keep dramshops within said territory so annexed or any part thereof, or providing that such license shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dramshop, then, such ordinance

shall continue in full force and effect, notwithstanding such annexation: Provided, the City Council or Board of Trustees, as the case may be, may on petition of one-fourth of the voters of the territory over which such ordinance extends, submit at an annual municipal election, but not oftener than every other municipal election, the question to the voters of such territory whether or not an ordinance shall be passed authorizing the issuing of dramshop licenses for such territory . . . It is intended by this section to continue in full force and effect all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dramshops is prohibited or regulated within said city, village or incorporated town or any part thereof, without the voters of the territory so affected consent, as hereby provided to the repeal of such ordinance by the city, village or incorporated town to which the territory is annexed."

Under the plain letter of this statute, this dramshop ordinance remained in force after annexation and still continues in force and there is no power in the City Council to repeal it or narrow its provisions without the consent of the people in the territory involved, obtained in the manner provided by this section of the Annexation Act.

In the *People ex rel vs. Cregier*, 138 Ill. 401, where a dramshop ordinance adopted by the Board of Trustees of the village of Hyde Park, prior to annexation, became involved after annexation and the question of the power of the City Council to repeal the ordinance was raised, the Supreme Court said, speaking of the effect of the annexation act upon the validity of the ordinance (page 423):

"By it that ordinance was continued in force, notwithstanding the annexation, and was placed beyond repeal by the City Council of the City of Chicago, except by consent of the voters of said districts."

Section 1 of the Cicero ordinance in question reads:

"No application for a license to sell or give away fermented, malt, vinous or intoxicating liquors shall be granted unless the same shall be accompanied with a petition praying that a license to sell liquors be issued to the applicant and

stating the exact locality where the applicant proposes to sell liquor and signed by a majority of the legal voters residing within one-half mile of the proposed place where liquors are to be sold."

Section 4 of this same ordinance reads in part as follows:

"The license shall state the time for which it is granted, which shall not extend beyond the first day of July next following. It shall state the place where the saloon is to be kept and shall not be transferable."

Ordinances of this character should be read in the light of the settled policy of this State with regard to the selling of liquors and this policy was announced by our Supreme Court in the very early case of *Munsell vs. Temple*, 3 Gilman 93, in the following language (page 96):

"The policy of our legislature has always been to restrain the selling of spirituous liquors by retail."

A license expires at the end of the period for which it is granted. This is true upon principle and is plainly so intended by the language of the dramshop ordinances in force in this city.

The provision of Section 4 of the Cicero ordinance is to the effect that it not only requires that a license state the time for which it is granted but provides that "it shall not extend beyond the first day of July next following."

Section 1340 of the Revised Municipal Code of Chicago, of 1905, as amended March 5, 1906 (Council Proceedings, page 2791), divides the license year into two periods as follows:

"From May 1 to October 31, inclusive," and "from November 1 to April 30 of the following year, inclusive," and provides that "Licenses may be issued for the full license year or for the unexpired portion thereof or for any period of the unexpired portion thereof . . . and provided further that no license shall extend beyond the 30th day of April next following its issuance."

Section 1329 of the Code of 1905 provides that no license shall be granted for a less period nor for a longer period than one year, unless specific provision shall elsewhere be made in this ordinance for the issuance of a license for a period of less

than one year and reads that "every license shall expire on the last day of April next following its issuance unless otherwise specifically provided in this ordinance."

It will thus appear that, by both the ordinance in question of the town of Cicero and the ordinance of the City of Chicago, licenses must be issued for fixed periods with the further expressed provisions that no licenses shall be issued to extend beyond a certain date, which clearly means that at the expiration of the period of time for which a license is granted, the license expires and the licensee desiring to continue his dramshop must thereupon obtain a new license therefor.

By section 1325 of the Revised Municipal Code of 1905, it is provided:

"All licenses authorized to be issued and required to be procured in and by this ordinance, which are granted by the mayor, shall be issued by the city clerk upon instruction or direction from the mayor so to do. *Written application* shall be made to the mayor *in each case*, except where otherwise specifically provided for, for such license and a new application shall be made upon the expiration of any license so issued before a new license shall issue. Any license granted by the mayor and issued by the city clerk shall be sent by the city clerk to the city collector for the collection of such license fee to be paid therefor, and upon the payment of such license fee the city collector shall deliver the license to the licensee; Provided, however, that in cases where provision is made for the division of any license year into periods and the issuance of a license for any such periods is provided for, applications need not be made in such cases at the end of each period, it being the intention to require application to be made for licenses annually only. In any case where frontage consents are required to be procured before a license shall issue, it shall not be necessary to secure the renewal of such frontage consents upon a renewal of such license, if such license be renewed forthwith, except where by law or special ordinance it is otherwise provided in regard to saloon licenses in local option districts."

Thus it is made to appear that a written application for a license must be made in each case except where otherwise

specifically provided for, and that a new application shall be made upon the expiration of any license so issued, before a new license shall issue. It is not otherwise specifically provided for in the Cicero ordinance in question, nor does the last sentence of Section 1325 effect the question here, first, because it relates only to *frontage consents*, while the Cicero ordinance requires the consent of legal voters, and second, because if the Cicero ordinance contemplates the filing of an application for each license that requirement can not be removed by the City Council, although the City Council may have the power to add additional requirements.

It is therefore plain that a new written application must be made upon the expiration of any license before a new license shall issue, and this brings us back to the language of Section 1 of the Cicero ordinance in question:

“No application . . . shall be granted *unless the same shall be accompanied* with a petition . . . signed by a majority of the legal voters residing within one-half mile of the proposed place where liquors are to be sold.”

is the language of that section.

Furthermore, it will be noted that this section requires the petition (not application) to state the exact locality where the applicant proposes to sell liquor.

Our Supreme Court said, in the Munsell case, *supra*, that licenses attach to the person.

The object sought to be attained by the adoption of such an ordinance may and should be considered in construing it. Unquestionably it was intended to give the legal voters of the territory in question a control over both the question of to whom licenses should be granted and where dramshops should be run, and it might very well be that the legal voters of a district would be willing to consent to the issuing of a license to a particular person to run a dramshop at a particular place for a stated period of time where it was within their control, by withholding their consent at the expiration of the period in question, to prohibit the issuing of another license if they should no longer desire a dramshop to be run at the place or by the person in question.

I am of the opinion that this ordinance requires a petition signed by a majority of the legal voters within the territory mentioned therein to be filed with *each* application for a license, regardless of whether the application is for the first license so to be obtained or for a new license by one who procured and filed such petition with a previous application.

If it be said that by reason of the increase in population in the territory in question, the requirements of the ordinance have become burdensome, it is to be answered that increase in population was clearly to be contemplated by the Board of Trustees when the ordinance was adopted and that, if it had been intended that any consideration should be given to that fact, provision therefor should, and no doubt would, have been written into the ordinance. Nor can it be argued that this requirement is one so unreasonable in its character as to require the ordinance to be held invalid, for the keeping of a dramshop is not a right, but a privilege, and it was within the power of the Board of Trustees to have made the territory in question prohibition territory, and being empowered to do the greater it had the power to do the lesser, which it did do by the creation of local option territory.

I have been advised that it has been the practice for many years on the part of the officer of the town of Cicero and thereafter of the City of Chicago by whom dramshop licenses have been issued, to construe this ordinance to mean that the petition in question need only be filed with the first application for a license, and the doctrine may be invoked that where, over a period of years, officers charged with the enforcement of an ordinance, statute or constitutional provision, have given it one construction, such construction on their part should have great weight with courts in construing such ordinance, statute or constitutional provision and, in most cases, should and will be adopted by the courts, but this doctrine carries with it as a qualification that such construction may have weight only in cases where by reason of ambiguity in the language of the ordinance, statute or constitutional provision in question, it is open to two constructions, for where the language is plain, courts should not, and will not, adopt an erroneous construction by officers charged with the enforcement of the law.

In Jarrott vs. Jarrott, 2 Gilm. 2-12, the court said, in speaking of contemporaneous construction:

“It is, however, to be remarked that contemporaneous construction can have no place where the intention is plain. In case of doubtful construction only it is admissible.”

And following the doctrine of this case, the Supreme Court in Cook County vs. Healy (222 Ill., 310), where the doctrine of contemporaneous construction was applied, said (page 317):

“If it could be said that the language of the constitution was clear and free from any doubt, a contrary legislative and administrative construction would have no weight.”

I am aware that a distinguished member of this bar, while serving this city as its Corporation Counsel, reached a conclusion opposed to the one which I am announcing to you in this opinion.

I have read with care his opinion and have considered the reasons stated in support of his conclusion, but can not agree with him.

It is my opinion that, under the plain reading of the Cicero ordinance, no license should be granted in that portion of the old town of Cicero which was annexed to the city, unless the application therefor is accompanied by a petition as provided for in that ordinance. Such a petition must be filed with *each* application, whether it be an application for a license to open a dramshop for the first time or for a license to a dramshop keeper who on some previous occasion procured and filed such a petition upon which a license was then granted.

Yours very truly,
 GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 19, 1907.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

Your letter of May 22d on the above subject, addressed to the Corporation Counsel, has been referred to me. You desire the opinion of this department on three questions:

First. Did the Chicago Telephone Company have authority to construct the tunnel?

Second. Has the Chicago Telephone Company any right to let a part of the space in the tunnel to the Chicago Edison Company?

Third. Can the Company be compelled to allow the City to place a water main in the tunnel?

The Company bases its authority to construct the tunnel upon a permit issued and signed by the Superintendent of Streets and dated June 11, 1906. The important part of that permit is as follows:

“Permission is hereby granted to Chicago Telephone Company *to open street in front of property known as La Salle street, between Haddock place and Kinzie street, to construct conduit for wires and cables under Chicago river.*”

Section 2 of the ordinance of January 4, 1889, under which the Company operates, provides that within certain territory all wires shall be placed under ground and that “said company shall at all times place and keep on file with the Commissioner of Public Works, plans showing the location of each conduit laid and number of ducts and wires in each conduit, and before laying any new conduit, said Company shall file with the Commissioner of Public Works a plan showing where each conduit is to be laid, location of manholes, or other openings to gain access to said conduits, and each cover for said openings shall have placed thereon the name of said Company, and no conduit shall be laid without first obtaining a permit from the *Commissioner of Public Works.*”

The permit obtained by the Telephone Company in my opinion does not comply with this ordinance in two respects: *First*, it is not issued by the Commissioner of Public Works, but by the Superintendent of Streets; *Second*, it is not a permit *to construct a conduit*, but simply a permit *to open a street* for the purpose of constructing a conduit.

The duties of the Superintendent of Streets are defined in Sections 1877, 1878 and 1879 of the Revised Municipal Code of Chicago of 1905. His duties do *not* include the granting of permits; nor generally can he sign the name of or act

for the Commissioner of Public Works. The Deputy Commissioner is the only person who has authority so to sign or act.

Revised Municipal Code of Chicago of 1905, Sections 1873 and 1874.

A permit must be granted by the proper authority, otherwise it is void.

McCormick v. South Park Commissioners, 150 Ill., 516.

The Telephone Company in securing a permit from the Superintendent of Streets was bound to know the extent of his power and authority; that is, it was bound to know that the Superintendent had no power or authority to issue the permit.

Abbott, Municipal Corporations, Vol. 1, pages 561-2.

Seeger v. Mueller, 133 Ill., 86.

City of Chicago v. Williams, 182 Ill., 135.

It is a well settled rule of law that acts of an officer unauthorized by ordinance do not bind the city.

American and English Encyclopedia Law, 2d Ed., Vol. 20, p. 1217.

Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill., 91.

Mayor and City Commissioner of Baltimore v. Eschbach, 18 Md., 276.

Hope v. City of Alton, 214 Ill., 102.

Sciery v. Springfield, 112 Mass., 512.

For the reason, therefore, that the Superintendent of Streets had no authority to grant it, I am of the opinion that the permit obtained by the Company is void. Moreover, even if the Superintendent of Streets had authority to grant such a permit, the permit granted on its face does not cover the work actually done by the Telephone Company. What the Company actually did was to open the street *and also* to construct a conduit under the Chicago river. The permit by its plain terms gives authority only *to open the street*, and, while it is clear that the street was to be opened for the purpose of constructing a conduit, the permit does not profess to give authority for such construction. A permit is in the nature of a grant by the municipality and, like all

other municipal grants, it is to be construed strictly against the grantee and in favor of the municipality. Its terms are to be construed as the terms of a written contract are construed, and when the language employed in a written contract is plain and unequivocal, the contract must be given its legal effect as written, even though the parties may have failed to express all that was intended.

Clark v. Mallory, 185 Ill., 227.

Canterberry v. Miller, 76 Ill., 355.

Schneider v. Turner, 130 Ill., 28.

Gibbs v. People's Nat. Bank, 198 Ill., 309.

I am therefore of the opinion that the express terms of the permit do not include the construction of the conduit.

The Chicago Telephone Company claims (as you state in your letter) not only that it had the right to construct the conduit or tunnel, but that, having constructed the tunnel larger than is needed for its own use, it has the right to let part of the space to the Chicago Edison Company for its wires and cables. Assuming that the permit is valid and gave authority to the Telephone Company to construct the tunnel, I am of the opinion that it has no right to let part of the space to another corporation. If the Telephone Company and the Edison Company jointly had obtained a proper permit for the construction of the tunnel, both companies might occupy it. In the absence of such a joint permit, I am of the opinion that the Telephone Company has no right to let any of the space to the Edison Company.

The ordinance to the Telephone Company does not directly or by implication give the Company the right to let to another corporation space in its tunnels or conduits; and it is well settled law that a grant such as was made by that ordinance will be strictly construed against the grantee, and furthermore, in case of ambiguity, nothing can be presumed in favor of the grantee.

Chicago Terminal R. R. Co. v. Chicago, 203 Ill., 576.

Blair v. Chicago, 201 U. S., 400.

Coosaw Mining Co. v. South Carolina, 144 U. S., 550.

City of Newport v. Newport Light Co., 89 Ky., 454.

Stein v. Bienville Water Supply Co., 141 U. S., 67.

In view of what has been said above, it naturally follows that the City of Chicago has no *legal* way of compelling the Telephone Company to allow part of the space in the tunnel to be used for a water main. The City has never authorized the construction of the tunnel; it does not recognize any right in the Telephone Company to maintain it. On the other hand, if the tunnel has been constructed under proper authority, the Telephone Company has the right to occupy it solely for its own purposes.

There is a practical way, however, for the city to secure the use of the tunnel for a water main. The Commissioner of Public Works may proceed to close up the tunnel; he may also (as indeed it is his duty) prohibit, by force if necessary, the occupation of the tunnel by the Edison Company. The Telephone Company has no right, even if the permit is valid, to let space in the tunnel to the Edison Company.

In my opinion the proper way to proceed is at once to serve a notice upon the Telephone Company to remove the tunnel. In case the Telephone Company refuses to comply, the City may then proceed to remove the tunnel.

Yours very truly,

EDWIN H. CASSELS,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 20, 1907.

ERNEST BIHL, ESQ., Alderman, Thirty-third Ward.

Dear Sir:

Your request for an opinion whether the city has power, by ordinance, to compel factories, machine shops, etc., to provide some means for furnishing immediate aid to injured employees, has been referred to me by the Corporation Counsel, and replying thereto, I beg to say:

I take it from the wording of your request that you have in mind, *first*, that some place should be set apart by the

employer, either in the factory or machine shop or near by, to which the injured employees should be immediately taken; *second*, that when so taken, they should be attended by a surgeon or some other medical man provided by the employer.

This would bring the object desired within the law concerning hospitals. A hospital has been defined to be an institution for the reception and care of sick, *wounded*, infirm or aged persons. (Cyclopedia of Law, Vol. 21, page 1105.) If this power exists in the City Council, it must appear in those powers expressly delegated to it by the Legislature. In the act for the incorporation of cities and villages, Chap. 24, p. 283 (Hurd's Rev. Statutes, 1905), there is found no grant or power providing for the establishment of these first-aid institutions by the owners of factories, machine shops, etc. The only reference made as to the powers of the City Council concerning institutions of the character desired is found in Clauses 77 and 78 of Section 1 of Article 5, Hurd's Rev. Statutes of Illinois, 1905. Clause 77 is as follows:

"To erect and establish hospitals and medical dispensaries and control and regulate the same."

Clause 78 is as follows:

"To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

It may be conceded, and it has been so decided, that the City Council under clauses 77 and 78 has power by ordinance to regulate institutions such as is desired, but the query is not regulation, but construction.

In *Frazier et al. v. City*, 186 Ill., p. 480, the court, in construing clause 77, sustained the right of the City to construct hospitals, even though private property should be damaged thereby, citing with approval *Rigney v. City of Chicago*, 102 Ill., p. 64; but nowhere can it be found that the city or the State has attempted to interfere with the rights and privileges of individuals or corporations in the conduct of private business where no public rights arise requiring the exercise of the police powers. The power to regulate does not carry with it the power to invade the lawful authority of the indi-

vidual or corporation to manage, conduct or control his or its own business. It should be borne in mind that an accident to an employee is personal in its nature and is not such a public question as to call into being the exercise of the police powers such as would be the case where contagion might spread.

Messrs. Horr and Bemis in their work on municipal police ordinances, say :

“The care and prevention of contagious diseases belong within the province of health regulations. Whenever contagion is feared from vessels landing at a port or harbor the corporation may subject all vessels coming into port to reasonable quarantine regulations. It is immaterial what the disease is so long as it is contagious. The officers can not take quarantined vessels into their own possession and control to the exclusion of the owner or captain; they can only exercise control as to those things that would tend to facilitate the spread of the disease. The right to detain and disinfect any kind of property ceases as soon as reasonable disinfection has been exercised, or as soon as all appearance of disinfection is lost. If a contagious disease is prevalent, hospitals and pesthouses may be erected and those suffering from the disease forced to remove to those places for treatment. And competent nurses and physicians may be employed at public expense to care for those who are confined to pesthouses. The municipal power extends only to public hospitals; it has nothing to do with private institutions.”

From a careful study of the authorities, I am of opinion that the City Council is nowhere given the power to compel factories, machine shops, etc., to provide means for furnishing immediate aid to injured employees.

Yours very truly,

FRANKLIN A. DENISON,
Assistant Corporation Counsel.

Approved :

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 21, 1907.

CHAS. J. FORSBERG, ESQ., Alderman, Thirty-fifth Ward, Chicago.

Dear Sir:

With reference to the question which you submitted to me, as to the right of one partner to continue the business of a dramshop for the unexpired term of a license, under a license issued to both of the partners, I am of the opinion that the remaining partner would have a right to continue such business under the old license for the unexpired term of the license period.

Black on Intoxicating Liquors, Section 134.

United States v. Glab, 99 U. S., 225.

United States v. Davis, 37 Federal Reporter, 468.

The remaining partner, however, would not have the right to enter into a new partnership and try to conduct the business under the same license.

Yours very truly,

GEORGE W. MILLER,

First Assistant Corporation Counsel.

JUNE 24, 1907.

E. J. MAGERSTADT, ESQ., City Collector.

Dear Sir:

I have your letter of the 18th inst., attaching a letter from Riverview Baseball Park and Amusement Company addressed to you, and also attaching a business card of said company, and asking for an opinion as to whether the Riverview Baseball Park and Amusement Company, in operating their ball park at Riverview Park, come under the provisions of the general amusement license of the Riverview Park Company, or whether they are required to take out a license under the Seventh Class of the Municipal Code, and which I understand, they are at the present time operating under.

In reply, would say that the City Council, by Section 99 and Section 109 of Chapter 6 of the Code, under the title-

head of amusements, has classified and specifically provided for the licensing of baseball games and parks, and, in order to exempt the Riverview Baseball and Amusement Company from the payment of this license fee, they would have to come under the Eleventh Class of Section 99, which is as follows:

“Eleventh Class. When several amusement enterprises, such as shooting the chutes, revolving wheels, merry-go-rounds, shooting galleries, giant swings, panoramas, musical and theatrical entertainments, and various other devices or entertainments, are carried on, engaged in, or conducted in any garden, park, or other inclosure, whether carried on, engaged in, or conducted as one enterprise or by several concessionaires, and whether one admission fee is charged for admission to all such entertainments or a separate fee is charged to each amusement enterprise, the various entertainments offered or conducted shall for the purposes of this chapter be considered as one enterprise and shall belong to and be known as entertainments of the Eleventh Class.”

In the application for annual amusement license filed by the Riverview Sharpshooters' Park Company with the City Collector under date of May 23, 1907, it is recited:

“(Description of place for which license is desired.) Amusement park with various riding devices and shows, such as merry-go-rounds, figure eight, etc.”

You will note there is no reference in this application to the operation by the Riverview Company proper of a baseball park in connection with Riverview Park proper.

From the letterhead of the Riverview Baseball and Amusement Company you will note that they are members of “Lake Shore Baseball League,” consisting of teams from Riverview Park, Chicago, Ill., Waukegan, Ill., Kenosha, Wis., Racine, Wis., Milwaukee, Wis., Port Washington, Wis., Sheboygan, Wis., and Manitowoc, Wis.

Upon investigation by this department (report of investigator attached), we have ascertained that Riverview Park proper is open to the public daily, but that the baseball park is only open to the public on two days of the week,

namely, Saturday and Sunday, when regular games are played.

You will note further in said report that upon their baseball ticket office appears the following: "Entrance to Baseball Park. Admission to Ball Park includes a free admission to Riverview Park. Prices, 15 and 25 cents. Box seats, 50 cents."

This advertisement seems to treat, so far as the baseball company is concerned, the baseball park as the main attraction and Riverview Park as an adjunct thereof, or as an added attraction. This same idea is carried out by the bottom line of their business card, viz.: "Admission into our ball park includes an admission to Riverview Park."

From the above facts it appears that the Riverview Baseball Park and Amusement Company are conducting an independent amusement enterprise at Riverview Park, and that it is conducted along entirely different lines from those of the regular and ordinary concessionaires of said company.

Had the Council intended to include an amusement of this character in the exemption from license contained in Class Eleven, it is only fair to assume that they would have made the same specific exemption in regard thereto as they have made with reference to musical and theatrical entertainments.

It is a familiar rule of law that a person claiming a right saved by a proviso or exception must show that the right claimed is clearly within the proviso or exception.

Epps v. Epps, 17 Ill., App., 196.

Also that, if, from the language used in the act, the exemption is doubtful, then there is no exemption.

Further, a statute (or ordinance) should be so construed so that all of its parts will not only be consistent with each other, but that every provision thereof should be given its proper effect, so that nothing in the act will appear superfluous or redundant.

Ill. Cen. R. R. Co. v. Chicago, Burlington & Northern R. R. Co., 122 Ill., 473.

Therefore it clearly appears, and we are of opinion, that the ball park conducted at Riverview Park does not, under

the circumstance, come within the "various other devices and entertainments" clause of Class Eleven, but that it does come under the Seventh Class thereof, and is, therefore, required to pay the license fee provided for therein.

Yours very truly,

OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 24, 1907.

JOSEPH Z. UHLIR, Esq., Alderman, Twelfth Ward.

Dear Sir:

In accordance with your verbal request I have prepared and transmit herewith an ordinance providing for the regulation of five-cent theaters and penny arcades, by requiring that the proprietors of such places of amusement shall obtain from the Chief of Police a permit for the exhibition of each picture or series of pictures shown or exhibited by such proprietors.

Section 1 of the ordinance provides that no moving pictures shall be exhibited without a permit granted by the Chief of Police.

Section 2 provides that before any such permit is granted an application shall be made therefor, and the pictures or the plates from which it is proposed to exhibit the pictures shall be shown to the Chief of Police, who shall examine the same and either grant or refuse the permit within five days thereafter.

Section 3 provides that no permit shall be granted for a picture or series of pictures which, in the opinion of the Chief of Police, is immoral, indecent, lewd, lascivious, or in any manner calculated or designed to subvert or injure the morals or in any way designed to make immorality or crime attractive to those who see it.

Section 4 provides for an appeal from the decision of the Chief of Police to the Mayor.

Section 5 provides that a permit shall be required in addition to any other license or imposition now required by the law or fixed by the city ordinance, and that no fee shall be exacted for the permit.

Section 6 provides that the permit may be transferred with the picture or series of pictures.

Section 7 provides a fine which shall be not less than \$25.00 nor more than \$100.00 for each offense. This section further provides that each day's exhibition of each picture or series of pictures without a permit shall be a distinct and separate offense.

Section 8 provides that the ordinance shall apply to all pictures now being exhibited or which hereafter may be exhibited.

Section 9 repeals all conflicting ordinances or parts of ordinances.

Section 10 provides that the ordinance shall take effect at the beginning of the thirtieth day after its passage.

The question involved in this ordinance is a novel one. What the ordinance really does is to provide for a censorship by the Chief of Police of five-cent theaters and penny arcades. The ordinance, therefore, is in advance of the usual legislation regulating and controlling places of amusement.

In Continental Europe the principle of the right of the government to establish a censorship of amusements, especially amusements in the nature of theatrical exhibitions, is, in one form or another, well established. In England new plays must be submitted to the Lord Chamberlain, who may prohibit them absolutely or for a time, as he may see fit.

Freund Police Power, Par. 251, p. 241.

Statutes 6 & Vict., Chap. 68, Secs., 12-15.

So far as I have been able to investigate, amusement censorships do not exist in America, and Freund, in his work on police power, states that it "may be regarded as prohibited by the spirit of the constitution."

Freund Police Power, Par. 251, p. 241.

Citing:

Dailey v. The Superior Court, 112 Cal., 94.

The California case cited by Professor Freund decided that it was not proper for a court to prohibit a theatrical representation of the crime for which Dailey was being tried. No question of the morality or decency of the play was raised. The case was decided under the provision of the constitution guaranteeing free speech, and I do not think Professor Freund's statement as applied to an ordinance such as the one in question is supported by authority.

In the United States no court of last resort, as far as I have been able to determine, has passed directly upon the question of the validity of an ordinance similar to the one which is transmitted herewith. The question of its validity, therefore, must be determined after consideration of the general powers of the City Council to control and to regulate amusements and theatrical exhibitions, and the decisions which define in other respects the extent of such powers.

In the first place, it is well to bear in mind that the ordinance under consideration is reasonable in its terms; it applies alike to all exhibitions of moving pictures; it prescribes a rule by which the Chief of Police is to be governed in passing upon the question of granting permits; it provides for an appeal to the Mayor; it provides that no fee shall be exacted for the permit; and, finally, the ordinance gives to exhibitors a period of thirty days after its passage within which to secure their permits.

If this ordinance is valid it is because of the fact that the powers therein exercised have been granted to the City Council by the State Legislature in some one or more of the following paragraphs of Section 1 of Article V of the Cities and Villages Act:

"Forty-first.— To license, tax, suppress and prohibit hawkers, peddlers, keepers of *theatricals or other exhibitions, shows and amusements*, and to revoke such licenses at pleasure."

"Forty-fifth.— . . . to prohibit the sale or exhibition of obscene or immoral publications, prints, pictures or illustrations."

"Fifty-eighth.— To regulate *places of amusement*."

“Sixty-sixth.— To regulate the police of the city and pass and enforce all necessary police ordinances.”

These powers, it will be admitted by all, are ample and broad, and must be designed to give to the City Council every means of regulating and controlling shows and amusements consistent with the terms and the spirit of the constitution.

That the City Council has the right under these grants of power to provide for the imposition of a license on theaters and places of amusement is clear — so clear that it seems never to have been questioned in Illinois. The courts of other States, however, where the question has been raised, have upheld the licensing of theaters and amusements as a reasonable exercise of powers similar to those granted in the paragraphs above quoted.

Abbott Municipal Corporations, Vol. 2, p. 994.

Am. & Eng. Ency. of Law, 2d Ed. Vol. 28, pp. 115-118.

Boston v. Schaeffer, 9 Pick., 415.

Duluth v. Marsh, 71 Minn., 248.

Baker v. Cincinnati, 11 Oh. St., 524.

Bell v. Mahn, 121 Pa., 225.

Charity Hospital v. Stickney, 2 La. Ann., 550.

The Supreme Court of Minnesota in the case of *Duluth v. Marsh*, 71 Minn., 178, points out the necessity of giving to municipal corporations a wide general discretion in the matter of regulating theaters and places of amusement. In that case it was held that a \$125.00 license fee for a period of six months for the privilege of running a theater in the City of Duluth was a reasonable fee. In the course of the decision the court said (p. 249) :

“In respect to theatrical exhibitions and amusements of similar character, a larger discretion on the part of municipalities is recognized than in the case of ordinary trades or occupations, both because they are liable to degenerate into nuisances, and also because they require more police surveillance and police service.”

The difference between the business of operating a theater or a place of amusement and an ordinary occupation has been pointed out by other courts in the following cases :

Western Turf Association v. Greenburg, 204 U. S. 359.

Boston v. Schaeffer, 9 Pick., 345.

Mankato v. Fowler, 32 Minn., 364.

Robertson v. Heneger, 5 Sneed, 257.

Freund Police Power, Pars. 250-251.

It seems, also, to be well settled law that in a case where a city official is charged with the duty of issuing licenses to theaters and places of amusement he may use his discretion to a reasonable extent. In other words, if there is reasonable ground for doubt from the facts presented to the officer in the application for such a license as to the morality or decency of the amusement or theatrical exhibition for which a license is asked, the decision of the officer issuing the license will be final.

People v. Grant, 58 Hun., 455.

People v. Board of Police, 36 Misc., 89.

Armstrong v. Murphy, 65 N. Y. App. Div., 123.

It must be admitted that the ordinance under consideration places the morality and decency of the pictures exhibited in five-cent theaters and penny arcades on the same ground as the Municipal Code now places the safety and healthfulness of the building in which such an exhibition is held. Under the present ordinances the Building Department and the Health Department are called upon to certify as to the safety and sanitary arrangement of the building in which a theater or amusement is to be held before the license is issued. This, of course, is for the purpose of seeing that the buildings are safe and healthful; the present ordinance is designed to make sure before the license is granted that the exhibition shall be clean and decent.

Under the police power of the city, as conferred by the Legislature and as expressed by the present ordinances of the city, the police have the right to suppress an immoral or indecent exhibition in a five-cent theater or in a penny arcade, and in my opinion, wherever under the proposed ordinance the Chief of Police would be justified in withholding a permit to exhibit pictures, he would now be justified without this ordinance in suppressing the exhibition of such pictures.

People v. Dorris, 14 App. Div. N. Y., 117.

I am of the opinion, therefore, that inasmuch as it is well settled that immoral and indecent pictures can now be suppressed after they are on exhibition, the courts will hold valid a reasonable ordinance which seeks to prevent the exhibition at all. If it is a proper exercise of the powers granted by the legislature to provide that theaters and places of amusement shall be safe and sanitary, before they are opened to the public, it ought also to be a proper exercise of the same powers to provide the amusement itself shall be clean and decent.

In the past the courts have not looked with favor upon legislation by municipalities which imposes burdens upon any trade or business; but, with the growth of the city and with the increased complexity of the affairs with which the city government is to deal, legislation such as the ordinance proposes becomes more and more necessary. The great and increasing number of five-cent theaters and penny arcades in Chicago, and the abuses which have arisen in connection with their conduct, seem to make such an ordinance necessary. "As a general rule any ordinance will stand the test of enforcement which has been enacted in good faith, after careful deliberation, as a remedy of real mischief, or providing for a real want."

Horr & Bemis Municipal Police Ordinances, Par. 293.

Because of the extent to which the courts have gone in upholding ordinances regulating and licensing amusements, and because of the fact that the ordinance is aimed to correct a real mischief in a reasonable and practical way, I am of the opinion that, even though the ordinance is a distinct step in advance in amusement regulation, it is a valid exercise of the powers granted by the Legislature to the City Council.

Yours very truly,

EDWIN H. CASSELS,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JUNE 25, 1907.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

I have been directed to reply to your letter of the 28th ult., transmitting a report of your engineer with reference to grades on Belden avenue; a letter from Leonard H. Harland; also a letter from W. R. Abbott, in which he says that he shall expect to receive damages from the City of Chicago by having changed the established grade after the building was erected and sidewalk constructed; also a petition, signed by several of the property owners on said street, in which they request that a grade be established in conformity with the sidewalks and coal vaults used on said street.

I have examined the Council Proceedings and ordinances of the City of Chicago in connection with the report of your engineer, and find that the following grades have been established on Belden avenue in this vicinity:

At Belden avenue and Clark street, 23 feet above city datum. Laws and ordinances of 1873, p. 37.

At Belden avenue and North Park avenue, 12 feet. Ordinance of June 14, 1880. Council proceedings, p. 56.

At a point 380 feet west of the west line of North Park avenue, 15 feet. Ordinance passed June 14, 1880. Council proceedings, p. 56.

On November 23, 1885, an ordinance was passed establishing the grade at the point last mentioned at 16 feet above datum. Council proceedings, p. 292.

At the north curb of Belden avenue opposite east curb of Sedgwick street, 21.8 feet. November 23, 1885. Council proceedings, p. 292.

At southeast corner of Belden avenue and Sedgwick street, 22.3 feet. Ordinance November 23, 1885. Council proceedings, p. 292.

The ordinance of November 23, 1885, contains the proviso "that the improvement of the roadway shall be in accordance with the elevation of the north curb of Belden avenue."

On March 20, 1899, an ordinance was passed establishing a new grade for the sidewalk on the south side of Belden

avenue, which was repealed on April 24, 1899, by an ordinance (Council proceedings, p. 144), and the grade was re-established as it existed heretofore.

I am informed that the buildings on the south side of Belden avenue, between Sedgwick street and North Park avenue, have all been erected since the year 1882, and that the sidewalks have been placed there after the buildings were put up. It appears that the sidewalks on the south side of the street from Sedgwick street east are above grade, and that at a point about 420 feet west of North Park avenue the sidewalk is between 3 and 4 feet higher than the grade established by the city ordinances; that the sidewalks east of said point are in accordance with the established grade, and that the sidewalks on the north side of the street are also in accordance with the city grades.

The claim is made by some of the property owners, whose sidewalks are above grade, that, inasmuch as the sidewalks have existed above grade for over twenty years, the city is estopped from changing the grade, and that they are entitled to damages from the city if they are compelled to lower their sidewalks. This position is not tenable, as the statute of limitations does not run against a municipal corporation in respect to property held for public use.

Shirk v. City of Chicago, 195 Ill., 298.

City of Sullivan v. Tichenor, 179 Ill., 97.

Neither is the city estopped from compelling the lowering of said sidewalks on the ground of an equitable estoppel. In the case of *Logan County v. City of Lincoln*, 81 Ill., 156, on p. 159, the court uses the following language:

“Recognizing, as we do, the doctrine of *estoppel in pais* may have its application to municipal corporations, still there is nothing in the suggestion the plaintiff is estopped to assert this claim simply by the non-action of the city officers. It would be a pernicious doctrine to establish that public rights of municipalities could be cut off by the neglect of the appointed officers for an unreasonable time to enforce them. Before the doctrine of estoppel can be invoked, there must have been some positive acts by the municipal officers which may have induced the action of the adverse party, and where

it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done. But mere non-action of its officers is not sufficient to work an estoppel as against a municipal corporation."

Said property owners are not entitled to damages from the city on the theory that their property can not be taken or damaged for public use without compensation, for the reason that they did not comply with the ordinances established at the time the sidewalks were constructed. On the contrary, the sidewalks were constructed in direct violation of the ordinances in order that coal vaults could be maintained under them.

I am of the opinion that Section 2129 of the Revised Municipal Code of Chicago, under which you served a notice to the property owners to lower their sidewalks, does not apply to a case of this kind. Said section merely applies to the removal of any article or thing which may obstruct the sidewalk, street or alley. I would advise that a new notice be served on said property owners, under Section 2076 of the Revised Municipal Code, which provides as follows:

"No part or portion of any sidewalk where the grade has been established shall be laid or relaid at any different grade or any other level than the adjacent portions of such sidewalks, and for every violation of this section there is hereby imposed upon the person violating the same a penalty of not less than five nor more than twenty dollars, and he shall also alter said sidewalk so as to make the same conform to the established grade, and, in case he neglects and refuses so to do within a reasonable time, it shall be lawful for the department of public works to alter the same, and the costs and expense of the same shall be paid by such owner and may be recovered from him in an action in the name of the city."

Yours very truly,

GEORGE E. DIERSSEN,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JULY 1, 1907.

TO THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On the 24th inst., your Honorable Body adopted the following resolution:

“ORDERED, That the Corporation Counsel be and he is hereby requested to prepare and submit to the Council, at its next regular meeting, or as soon thereafter as is possible, an opinion as to whether or not it is within the power of the City of Chicago to levy and collect special assessments against the real estate held by the South Park Board and used by it for small parks.”

I am directed by the Corporation Counsel to make reply to the inquiry contained in this order.

The legislature of this State, at its session held in 1901, passed an act entitled “An act to enable park commissioners to acquire, improve and maintain additional small parks or pleasure grounds,” which act was approved and went in force on May 10 of that year. By Section 1 of this act, it is provided, that for the purpose of creating additional small parks or pleasure grounds, any board of park commissioners shall have the power to acquire by purchase, condemnation or otherwise, any lot, block or parcel of land which shall lie within the district or territory, the property of which shall be taxable for the maintenance of the parks or boulevards under the control of any such board of park commissioners; with a proviso that each park or pleasure ground so acquired shall not exceed ten acres in area or extent.

Under Section 2 of the act, in case the park commissioners are unable to agree with the owner or person interested in any of the property selected by it for the creation of small parks or pleasure grounds, it may condemn such property under the right of eminent domain.

The language of Section 4 of this act is as follows:

“Such board of park commissioners shall have the same power and control of the lots, blocks or parcels of land taken under this act as are or may be by law vested in it, of and concerning the parks, boulevards and drive-ways now under its control.”

It will be seen that the land acquired by a park board for small parks or pleasure grounds is held by the board in the same manner and subject to the same conditions as any other property constituting the park or parks under its control. The question, therefore, is whether the City of Chicago has the power to levy and collect special assessments against the real estate held by the South Park Commissioners and constituting the parks under its control.

In the *West Chicago Park Commissioners v. the City of Chicago*, 152 Ill., 392, the city levied and the County Court confirmed a special assessment upon the lands embraced in Douglas Park — one of the parks under the control of the West Chicago Park Commissioners — to pay the cost of a street improvement; the improvement consisting of the erection of certain boulevard lamps on California avenue. From this judgment of the County Court an appeal was prayed and the case taken to the Supreme Court. The question whether the City of Chicago could levy an assessment upon this park property was squarely presented to the court. The court, after a careful analysis of the act of February 27, 1869, under which the corporation known as the West Chicago Park Commissioners was formed, and of various other subsequent acts supplemental thereto or amendatory thereof, held that the West Chicago Park Commissioners was a municipal corporation created for the purpose of laying out, establishing, improving and maintaining certain parks, boulevards and ways within the territorial limits of the City of Chicago with full and exclusive power and authority not only to lay out and improve, but also to govern, regulate, manage, control and direct the same, and that its power and authority in all these respects are plenary and *exclusive* of that of the City of Chicago. The following may be quoted from the opinion:

“By the terms of the park act, the park board is given ‘full and exclusive power’ to govern, manage and control all parks, boulevards and ways authorized by the act. By the several supplemental acts under which the board acquired authority to take possession of and control certain existing parks in the town of West Chicago and the streets adjacent to its parks and other streets to be selected for the purpose

of forming connections between its parks and other portions of the city, those parks and streets were transferred from the jurisdiction of the City of Chicago and were placed under the exclusive power and control of the park board, the same as the parks and boulevards originally laid out and improved by it. It follows that the power of the park board over all these parks, boulevards and streets for the purposes prescribed by these statutes is plenary, while that of the city is wholly excluded. And this exclusion, so far as it relates to any power on the part of the city to govern, manage, control or interfere with these parks, boulevards and streets after such, is as complete as it would have been if the parks, boulevards and streets had been wholly withdrawn from the territorial limits of the city. Indeed the legal effect of the various park acts would seem to be, to take them out of the territorial jurisdiction of the city, so that, so far as the power of the city in relation to them is concerned, the corporate organization of the city is practically dissolved. . . .

“We do not intend to intimate that in the exercise of other municipal powers and functions the city is excluded from jurisdiction over the park property, but only that so far as relates to the laying out, improvement, management and control of the parks, the jurisdiction of the park board is exclusive. For all the purposes, then, of laying out, improving and maintaining parks, boulevards, streets and like public grounds, the city and the park commissioners occupy the legal position of two independent and co-equal municipalities, each vested with exclusive jurisdiction over the public grounds committed to its care as trustee for the public. Neither can inroach upon the territorial jurisdiction of the other, but they stand, so far as these public grounds are concerned, in substantially the same legal relation to each other as though their territorial limits were embracing, adjoining, but wholly separate areas. So far, then, as relates to all questions of street improvements, the West Chicago parks and boulevards are no more to be considered as a part of the City of Chicago than they would be if they were situate within the adjoining city of Evanston. . . .

“The view we are disposed to take in the present cases is

that the parks under the control of the West Chicago Park Commissioners are not exempt from assessment by the proper municipal authority for local street improvements any more than are other public grounds, but only that, by the park acts, jurisdiction to make such assessments is withdrawn from the City of Chicago; the parks being by force of those acts for all street purposes taken out of the territorial limits of the city and placed within the exclusive jurisdiction of the park board."

The court concluded that the assessment under consideration was imposed without legal authority and was void and the judgment of confirmation was reversed.

In *Billings v. The City of Chicago*, 167 Ill., 337, the city levied a special assessment for the improvement of the roadway on West Lake street. A judgment of confirmation was entered by the County Court from which an appeal to the Supreme Court was taken. One of the objections was that the property known as Union Park was not assessed. Upon the right of the city to assess this particular property, the court said:

(P. 341.) "It appears from the record that property known as Union Park is located on the line of the proposed improvement and was not assessed. This property was one of the public parks in Chicago under the control of a board of park commissioners, and under the ruling of this court in *West Chicago Park Commissioners v. City of Chicago*, 153 Ill., 392, the City of Chicago had no power to levy a special assessment on the property."

It is perfectly clear, therefore, that the City of Chicago has no power to levy a special assessment upon any of the property included in and constituting a part of the public parks under the control of the West Chicago Park Commissioners.

Does the same rule apply in the connection to the South Park Commissioners?

The corporation known as South Park Commissioners was created under an act of the Legislature entitled "An act to provide for the location and maintenance of a park for the towns of South Chicago, Hyde Park and Lake," approved

February 24, 1869. The general laws relating to public parks enacted subsequent to the adoption of the Constitution in 1870, to which attention was directed by the court in the West Chicago Park Commissioners' case, apply to the South Park Commissioners as well, and an examination of the original charter of the South Park Commissioners, together with the subsequent acts referred to, will disclose that this corporation comes within the definition of a municipal corporation as contained in the opinion last referred to. In fact, our Supreme Court has so characterized it in other cases.

There is an additional element for consideration in connection with the South Park Commissioners to be found in Section 15 of its original charter, which reads: "The real estate and personal property of said corporation shall be exempt from taxation and assessment."

Confining myself to the question submitted to the Corporation Counsel by your Honorable Body, I beg to advise you that, in my opinion, the City of Chicago has not the power to levy and collect special assessments against the real estate held by the South Park Board and used by it for its small parks.

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JULY 2, 1907.

WALTER J. RAYMER, ESQ., Business Agent.

Dear Sir:

I have been directed to reply to your communication of June 28, 1907, in which you ask the Corporation Counsel for an opinion as to whether the City has the right to rent space on its waste paper boxes for advertising purposes.

It was held in the case of *State ex rel. v. City of St. Louis*, 161 Mo., 371, that the placing of advertisements on waste paper boxes subjects the public streets to a private purpose, to-wit, the advertising of individual business and enterprises, and that the City can not devote its streets to such a purpose. This case has been cited with approval in *People v. Clean*

Streets Co., 225 Ill., 470, and the latter case is the one you refer to in your letter.

It will, therefore, appear that the City has no right to rent out space for advertising on its waste paper boxes.

Yours very truly,

GEORGE E. DIERSSEN,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

JULY 8, 1907.

W. A. EVANS, M.D., Commissioner of Health.

Dear Sir:

The letter of Chief Sanitary Inspector Ball as to whether an order for additional closets in the premises occupied by the International Tailoring Company, at 266-272 Adams street, should be enforced against the tenant or the owner of the building has been handed to me by Mr. Pritchard with a request for an opinion upon the matter.

Section 1267 of the Revised Municipal Code, which has to do with the ventilation and sanitation of factories, workshops, etc., provides that:

“No person, being the owner, proprietor, lessee, manager or superintendent of any store, factory, workshop or other structure or place of employment where workmen and workwomen are employed for wages, shall cause, permit or allow the same or any portion or apartment of, or any room in such store, factory, workshop or other structure or place of employment, to be overcrowded or inadequate, faulty or insufficient in respect of light, ventilation, heat and cleanliness,” etc.

Section 1268 provides that “all such places of employment or service shall be kept in a cleanly condition,” etc.; also that “sufficient and separate water closets shall be provided for male and female employees, and such water closets shall be properly ventilated.”

The plain intention of the Council in passing these sections was to protect the health of the employees, and in order

that this protection might be insured it was provided that the duty of keeping such premises in a sanitary condition rests upon "the owner, proprietor, lessee, manager or superintendent of any store, factory, workshop or other structure or place of employment where workmen and workwomen are employed for wages." It is the plain intent of the ordinance that such provisions shall be enforceable against any one of the persons named in Section 1267.

I am therefore of the opinion that the order requiring additional closets may be enforced either against the tenant or the owner of the premises, as may be deemed advisable by the Chief Sanitary Inspector.

It is not necessary for the Health Department, under this ordinance, to decide who is liable to pay for the changes ordered to be made. That is a matter to be settled between the owner and the tenant. The Health Department can not be required to construe and interpret the contracts between owners and tenants. The ordinance purposely gives the right to the Health Department to enforce this ordinance against any one of several parties without deciding where the ultimate liability to pay for needed changes rests. Any other construction of this ordinance would place an undue burden upon the Health Department, and would make it difficult to carry out the purpose of the ordinance.

Yours very truly,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JULY 12, 1907.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

I am in receipt of your favor of July 10, asking for an opinion from this office on the question whether the Reaper Company, wholesale spirituous liquor dealers, with offices and warehouse in this city, are excused from taking out a

wholesale license on the ground that they are doing a mail order business exclusively and make sales only to customers outside of the city. I infer from your letter that this company carries its stock at its warehouse in Chicago, that sales are made from their Chicago office direct to the customers and that goods sold are billed direct to the customers from the office of the company.

The ordinance affecting this case is found at Section 1367 of the Revised Municipal Code and reads as follows:

“No person or corporation shall sell, or offer for sale, any spirituous liquor in quantities of one gallon or more, at a time, within the city without first having obtained, as hereinafter provided, a license so to do, for each place of business where spirituous liquor is so sold or offered for sale. But no distiller, who has taken out a license as such, and who sells only distilled spirits of his own production at the place of manufacture, shall be required to obtain the license herein prescribed, on account of such sales.”

It appears, therefore, that the only question presented is whether sales made by this company are consummated within the city, or whether goods must be actually received by the purchaser before the title passes.

In *Black on Intoxicating Liquors*, in discussing sales made outside of the territory covered by the dealers' license, it is said at Section 434:

“The sale is made at the place where the goods are separated from the general stock and delivered to the carrier, such delivery being delivery to the consignee.” (Citing numerous cases.)

The case of *Brechwald v. The People*, 21 Ill., Appellate, 213, is also in point.

The court says, at page 215:

“When the terms of sale are agreed on and the bargain is struck and everything the seller has to do with the goods is complete, the contract of sale becomes absolute between the parties without actual payment or delivery, and the property and risk of accident to the goods rest in the buyer.

“A delivery to a common carrier is generally deemed a delivery to the consignee.”

See also *City of Carthage v. Duvall*, 202 Ill., 234, in which the following rule announced in *17 Am. & Eng. Encyc. of Law*, 2nd Ed., page 300, is cited and followed:

“In a number of decisions it has been held that for the purpose of determining whether the seller has violated the liquor laws in force where the buyer lives, a sale C. O. D. is not complete until delivery, acceptance, and payment of the price by the person ordering the liquors. At least so far as cases dealing with intoxicating liquors are concerned, however, the weight of authority is against the foregoing view, and it is generally held that where intoxicating liquors are ordered to be shipped C. O. D. the sale is completed when the liquor is delivered to the carrier.”

To same effect see *Carthage v. Munsell*, 203 Ill., 474.

L. S. & M. S. Ry. Co. v. National Live Stock Bank, 178 Ill., 506.

I would say, therefore, that where a wholesale liquor dealer takes orders by mail exclusively from customers residing outside of the city for goods to be selected and forwarded from stock kept in his warehouse in Chicago, and such goods are billed direct to customers from the Chicago office, the sales must be considered as being made in Chicago, and the dealer is therefore brought within the terms of the ordinance above quoted, and is required to take out a wholesale license.

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JULY 12, 1907.

B. J. MULLANEY, Esq., Secretary to the Mayor.

Dear Sir:

Replying to your inquiry as to what the law is relative to orders and ordinances passed last Monday night, we would advise you that the Mayor has until the next regular meeting

of the City Council in which to approve or veto any ordinance passed at the meeting of July 8, and that no ordinance passed at that meeting is in force until the meeting of September 3, unless the Mayor approves it.

It is not required that the Mayor approve Council orders or resolutions. If they are merely administrative, they take effect upon passage, and if they are not administrative, and are in violation of ordinances, they are void.

Yours truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JULY 22, 1907.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

Answering your favor of July 22 in regard to the right of a party who has signed a frontage consent for a permit to move a frame building from 93 Fry street to 301 West Huron street, to withdraw such consent before the issuance of the permit, will state that our Supreme Court in the case of *Theurer v. The People*, 211 Ill., 296, decided "that the act of signing such petition is not an irrevocable act, and that it may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it," following the decision in the case of *Little v. Board of Supervisors*, 198 Ill., 205, and other decisions of our State courts.

I am of the opinion that a party signing the frontage consent required by ordinance before a building shall be moved may withdraw that consent at any time before the petition for such consent has been formally acted upon and the permit to move the building granted.

In this case the fee for the permit had not been paid nor the petition formally acted upon before this withdrawal was filed in your office, and I am therefore of the opinion that the party may legally withdraw her consent. The permit should

not be issued unless sufficient frontage consents have been obtained to make the required amount of frontage.

Yours very truly,

WM. S. STAHL,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

AUGUST 6, 1907.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

Under date of May 13 last, there was presented to you an application by the Sanitary District of Chicago to erect poles and string wires thereon on certain main streets in the City of Chicago for the purpose of furnishing electrical energy to the villages of Evergreen Park, Morgan Park and Blue Island.

Section 1 of an act entitled "An act to regulate and prescribe the conditions for the granting of rights and privileges for lighting and heating purposes by cities, villages and incorporated towns, and providing a remedy by the property owner where such conditions have not been complied with," approved June 5, 1897, and in force July 1, 1897 (Starr & Curtis' Revised Statutes, Vol. 4, p. 218), provides in part as follows:

"The city council in cities . . . shall have no power to pass an ordinance granting to any person or corporation . . . the right or privilege to . . . string on poles any wires on, over, or by which electricity for lighting purposes is to be used, conveyed or distributed in any street, alley or public grounds in any such city . . . except upon the petition of the owner of the land representing more than one-half of the frontage on the street or alley or so much thereof as is sought to be used for the purposes above mentioned . . . Any person being the owner of or being interested in any lot fronting on any street or alley or part thereof as is sought to be used for any or either of such purposes shall have the right, by bill in chancery, in his or their own name, to enjoin any person or corporation using such

street or alley or part of street or alley for either of such purposes under any grant by the city council . . . which is not made in conformity with the provisions hereof, and the sufficiency of the petition herein required shall be ascertained by the court in which such bill in chancery may be filed."

No petition of consenting property owners, as required by the section thus quoted, has been obtained; nor has the City Council attempted, by ordinance, to authorize the Sanitary District of Chicago to erect poles and string wires in the streets included in the application for a permit.

The question raised by the application for the permit is, whether the act of 1897 applies to the Sanitary District of Chicago, for, if it does, it follows from the statement previously made that the City has no authority to grant the permit requested, nor has the Sanitary District any right to erect poles and string wires thereon in the streets enumerated in the application.

This same question arose under an application heretofore made for such a permit, and under date of November 1 last, William D. Barge of this Department rendered an opinion to the then Commissioner of Public Works, advising him that the frontage act in question applied to this case and that he had no authority to issue the permit applied for. Under date of the 26th of that month, Jas. Hamilton Lewis, then Corporation Counsel, reviewed the question, and, in an opinion addressed to the then Commissioner of Public Works, expressed a contrary conclusion to the one announced by Mr. Barge.

Upon the receipt of this present application the question was investigated by Emil C. Wetten of this department, and in an opinion of some length, he agreed with the conclusions announced by Mr. Barge. It appears also that the Sanitary District invited an opinion from P. C. Haley, a distinguished member of this bar, upon this same subject, and, upon a line of reasoning different than that adopted by Colonel Lewis, he reached the opinion that the frontage act of 1897 did not apply, and that under the statute authorizing the Sanitary District to dispose of its surplus electrical energy, it had the right, even without procuring a permit from the City,

to erect poles and string wires thereon in the public streets of Chicago.

With this contrariety of opinion upon the question, I have, personally, examined the statutes involved and authorities throwing light upon the question itself, and beg to announce to you my conclusions:

Section 5 of "An act in relation to the Sanitary District of Chicago to enlarge the corporate limits of said District and to provide for the navigation of the channels created by such District, and to construct dams, water-wheels and other channels necessary to develop and render available the power arising from the water passing through its channels and to levy taxes therefor," approved March 14, 1903, in force July 1, 1903 (Hurd's Rev. Stat. 1906, p. 371), reads in part as follows:

"The said Sanitary District of Chicago is hereby authorized to construct all such dams . . . as may be necessary or appropriate to develop and render available the power arising from the water passing through its main channels and any auxiliary channels now or hereafter constructed by said District."

Section 6 of the same act provides, in part, as follows:

"The power made available by the works constructed under the provisions of this act shall be converted into electrical energy and shall be transmitted to the various cities, villages and towns within said Sanitary District or adjacent to the main channel of said Sanitary District, and may be used in the lighting of said cities, villages and towns or parts thereof, or for the operation of pumping plants or machinery used for municipal purposes or for public service, or may be disposed of to any other person or corporation upon such terms and conditions as may be agreed to by the Sanitary District."

In connection with the sections of the statutes quoted, *supra*, attention should be called to Article V of the Cities and Villages Act (Chapter 24), dealing with the powers of City Councils, and, particularly, to Clauses 9 and 10 of Section 1 of that article (Starr & Curtis' Vol. 1, p. 694). In speaking of the power and control of cities through city coun-

cils over public streets, Clause 9 provides: "To regulate the use of same," and Clause 10, "to prevent and remove encroachments or obstructions upon the same."

The Sanitary District of Chicago is a municipal corporation. (*Reddick v. The People*, 82 Ill., App. 85.) As such, its powers may be divided into two classes (1) those which are governmental or political; and (2) those which may be described as proprietary or private.

In the exercise of the latter class of powers, it stands precisely as an individual or a private corporation, and has to be governed and controlled accordingly.

Dillon, in his work on Municipal Corporations (Vol. 1, Section 66), makes this division of power, and speaking of such corporations acting in their proprietary or private character, says:

" . . . and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded, *quoad hoc*, as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it is omnipotent."

The same author in the next succeeding section says:

"This division of the powers of a municipal corporation into two classes, one public and the other private, has been before alluded to, and is well established."

A leading case on this subject is *Bailey v. The Mayor*, etc., 3 Hill 531, where the City of New York, under acts of the New York legislature and ordinances of the city, erected a dam in connection with its effort to supply the city with pure water, and where, by reason of the negligence in the erection of the dam, damages resulted to the property of a citizen. The court, in a suit brought to recover the damages, had occasion to mark the distinction between these two classes of powers, and in the course of its opinion said (539):

"To this end regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purposes of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character.

But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

It was held that the construction of the dam by the city in the course of its effort to create a system of water-works which would supply the inhabitants of the city with water was done, not in the exercise of its governmental powers, but in its private or proprietary capacity, and that it was therefore liable in damages.

The same doctrine is applied to the City of Philadelphia in *re Western Savings Fund Society v. City of Philadelphia*, 31 Pa., 185, in connection with the manufacture and sale of gas. The Supreme Court of Georgia recognized and applied the same doctrine in the *City of Augusta v. Hudson*, 88 Ga., 599, where the city controlled a bridge constructed across the Savannah River and collected toll from those using the bridge. The suit was one for damages brought by reason of injuries received by Hudson in crossing the bridge. A single sentence may be taken from the opinion (605) :

"So far as keeping and maintaining this bridge for gain is concerned, this corporation entered the State of South Carolina to engage in a private business and enjoy the profits thereof."

See also,

Bullmaster v. City of St. Joseph, 70 Mo. App., 60.

Bodge v. Philadelphia, 167 Pa. St., 492.

In this latter case it was held that the electrical bureau of the City of Philadelphia was controlled and operated by the city, not in its governmental capacity, but in its private capacity, and it was pointed out that it derived a revenue from this source which went into the city treasury.

An examination of the statute under which the Sanitary District is authorized to dispose of its surplus electrical energy will disclose that it may furnish this electrical energy to cities, villages, towns, or to any individual or private corpora-

tion, "upon such terms and conditions as may be agreed to by the said Sanitary District."

It is thus plain that the District may prescribe terms and conditions under which its surplus electrical energy will be furnished, and so far as individuals and private corporations, at least, are concerned, may stipulate the price, the manifest purpose of the act being to save this available water power and convert it into a thing of value by vesting in the District power, by the construction of dams, to generate, not only such electrical energy as may be needed by the District in carrying out the purposes of its creation, but a surplus which might be a source of revenue to the District, just as the water works of Chicago afford a source of revenue to this city. This grant of power, in so far as it relates to the municipal corporation known as the Sanitary District of Chicago, of necessity must be held to be of private advantage and emolument; and if it be replied that this source of income is also of benefit to the public at large included within the territory comprising the District, it may be answered in the language of the *Bailey* case *supra*, that "if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company."

I am of the opinion, therefore, that in the exercise of this power to the District to generate electrical energy and to furnish the same to cities and villages, persons or private corporations, the District does not act in its governmental capacity, but in its private or proprietary capacity, and that it must be treated precisely the same as would any private corporation applying for a permit to erect poles and string wires thereon in the streets in question.

It has been argued on behalf of the District that the State, through the Legislature, may control the public highways, and that although by act of the Legislature control of the streets of the city may have been vested in the city, yet, power remains in the State through its Legislature to repossess itself of that control; that where the State by act of its Legislature has granted a power or charged a corporation with the performance of a duty, there follows by implication the right to

do all things necessary to exercise that power or to discharge the duty; and the argument is that the Legislature, by the act of 1903, above referred to, not only authorized, but made it the duty of, the District to both generate electrical energy and to supply its surplus to cities, villages, towns and other persons and corporations, from which it is insisted there followed by necessary implication the right to do all things necessary to carry out that power and discharge that duty; and upon this line of reasoning, it is insisted that it was the intention of the Legislature that the frontage act and the provisions of the City Charter giving to the City of Chicago the control over its public streets must be held not to apply to the Sanitary District in this particular instance, but that it must be held to have the right, without procuring frontage consents, and although a permit is here applied for, the position is taken, without a permit to erect poles and string wires thereon in the city's public streets.

In this connection Sections 5 and 6 of the act of 1903 in question may be examined for the purpose of ascertaining whether the provisions in question are mandatory or permissive. In construing these two sections they are to be read as a whole and so construed that effect is to be given to all their provisions. It will be noted that by Section 5 the District *is authorized* to construct dams, etc. This is not the language of a command, but rather is a vesting of authority, a grant of power. In Section 6 the provision is that the power "*shall* be converted into electrical energy, and *shall* be transmitted to the various cities," etc. There then follows the enumeration of cities, villages, towns or parts thereof and other persons or corporations as the classification of those to whom the surplus electrical energy may be furnished.

An examination of this section will disclose, first, that while the word "*shall*" is used both in connection with converting the power into electrical energy and the provision as to its being transmitted, the transmitting of the power must depend, first upon whether there is a city, village, town or other person or corporation desiring to take and use the energy in question; and second, whether the terms will be agreed to by the Sanitary District. If it be assumed that the

Legislature by the use of the word "shall" in the fore part of Section 6 intended to make it mandatory on the Sanitary District to furnish this energy, it is impossible to understand why the Legislature would vest in the District power to control absolutely the terms upon which the electrical energy should be furnished, and thus by stipulating unreasonable terms nullify the previous provision of the section.

It is a familiar rule of construction that the words "may" and "shall" are often used in statutes interchangeably, and that where it seems necessary, in order to give effect to all of the provisions of the sections, the word "may" will be construed to mean "shall" or the word "shall" will be construed to mean "may."

Reading these two sections as a whole, I am of the opinion that it was the intention of the Legislature to vest in the District authority to generate and transmit this surplus energy, and that it was not intended that the language of Section 6 should be mandatory, and, so construing these sections, the word "shall" should be construed to mean "may." If I am right in this construction of these sections, it to a very considerable extent destroys the force of the argument heretofore suggested as having been made on behalf of the District concerning the implied powers growing out of the language of these sections.

Furthermore, these two sections of the statute must be read in connection with the two clauses quoted from the Cities and Villages Act, and with the Frontage Act of 1897. It is perfectly manifest from a reading of the Cities and Villages Act that it was the intention of the Legislature to give to the city council of cities adopting that act, control of their public streets, subject, of course, to such legislation as might from time to time be enacted to limit that right.

The Frontage Act of 1897 is a limitation upon the power of the City Council over its public streets, and that limitation is in behalf of the owners of abutting property. An examination of the act of 1897 will disclose that it was the intention of the Legislature to vest in the owners of abutting property power to determine whether the City Council might by ordinance authorize the use of public streets for certain

enumerated purposes, one of which was the erection of poles and stringing of electric wires thereon. Believing, as I do, that the Sanitary District in the generation and transmission of its surplus electrical energy must be treated as a private corporation, there appears to be no reason why it should not be held to come within the provisions of the frontage act referred to, unless it is to be held that, in so far as the District is concerned, the frontage act has been repealed by Sections 5 and 6 of the act of 1903.

There is no express repeal of it — in fact, the act of 1903 makes no mention of the frontage act. Therefore, if the act of 1903 operates to repeal the act of 1897, it must be by implication. Repeals by implication are not favored in the law. Our Supreme Court said in *Village of Hyde Park v. Cemetery Association*, 119 Ill., 145, 147:

“In the construction of statutes it is a rule of law well settled that a repeal by implication is not favored, and where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication.”

Again, in *Village of Ridgway v. Galatin County*, 181 Ill., 521, 525, the court said:

“A repeal of the act of 1872 can only result on account of such inconsistency between the two acts that they can not both stand. Such a repeal is not favored in the law, and a later statute will never be held to repeal an earlier one, unless they can not be reconciled. It is the duty of the court to construe them so as to avoid repeal, if such a construction can be given, and a statute will never be held to be repealed by implication if it can be avoided by any reasonable hypothesis.”

Under this familiar rule of construction it becomes necessary to so read the Frontage Act of 1897, and the act of 1903, as to reconcile them, if indeed there be any inconsistency between their provisions. There is no difficulty in holding that, although authorized by the act of 1903 to generate and transmit electrical energy, yet, when in its private capacity the Sanitary District embarks in an enterprise as a private corporation, it must submit to being governed and controlled by

the same laws which under similar conditions govern and control other private corporations.

No ordinance has been passed by the City Council authorizing the use of the streets in question by the Sanitary District for the erection of poles and stringing of wires. Section 2166 of the city ordinances (Revised Municipal Code of 1905) provides that:

"No person or corporation shall erect, construct, maintain or use any pole, line or wire, or electric conductor of any description whatever within the city, without first having obtained a permit therefor, under a valid and existing ordinance, from the commissioner of public works . . . "

You will note that your right to issue a permit for such a purpose depends upon the existence of a valid and existing ordinance. There is no such ordinance, hence, no right to issue such a permit.

From these conclusions, it follows, I am of the opinion, that you have no right to issue the permit in question, and I so advise you.

Yours very truly,
 GEORGE W. MILLER,
First Assistant Corporation Counsel.

AUGUST 7, 1907.

L. E. GOSSELIN, ESQ., Deputy Comptroller.

Dear Sir:

The Corporation Counsel has requested me to advise your department as to how long advertisements of the letting of contracts for supplies to be furnished the various departments must be published, and after careful investigation of the ordinances and statutes I have come to the conclusion that a ten-day publication in the corporation newspaper is sufficient.

Section 39 of the Revised Municipal Code of 1905 provides that:

"All contracts for work, material, or supplies of any kind or nature, let by any officer of the city, where the amount of such contract exceeds five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same. All

such contracts before becoming of any effect shall be approved and countersigned by the comptroller.

“Advertisement shall be made and bids submitted and received by the proper officer in the same manner as is provided for the letting of contracts in and by the provisions of Article 1 of Chapter 52 of this ordinance concerning the letting of contracts by the department of public works.”

Chapter 52, Section 1847, provides that:

“All contracts for the making of any public improvement or for any work or other public improvement, when the expense thereof shall exceed the sum of \$500.00, shall be let to the lowest bidder after advertising the same.”

Since there is no ordinance fixing the period for which this advertisement must run, we must necessarily inquire whether or not this question is controlled by statute.

There is no provision in the Cities and Village Act (the present Chicago charter), fixing either the length of time or the intervals for publication of notices, so that the provision in the Charter Act of 1863 governing the publication of notices for the letting of contracts by the board of public works must control.

Paragraph 17, Section 6 of the said act, provides:

“Whenever any public improvement shall be ordered by the common council of said city, and the assessment for the same (where the same is to be paid for by special assessment) shall have been confirmed, and one-half of such special assessment shall have been paid into the city treasury, the said board of public works shall advertise for proposals for doing said work; a plan or profile of the work to be done, accompanied with specifications for the doing of the same, being first placed on file in the office of said board; which said plan, profile and specifications shall at all times be open for public inspection; which advertisement shall be continued for at least ten days in the corporation newspaper, and shall state the work to be done.”

Applying the last quoted section to the section first above quoted, I am of the opinion that the time therein stated is the requisite term of publication, and that publication should be made daily (except Sunday) for a period of ten days.

It might be well to add that a council order for the letting of any particular contract by your department should be obtained, for the reason that it is extremely doubtful whether or not any department of the City of Chicago other than the Commissioner of Health, the Business Agent and the Commissioner of Public Works is invested with any authority to enter into a contract on behalf of the city.

Yours very truly,

HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

AUGUST 8, 1907.-

WALTER H. WILSON, Esq., Comptroller.

Dear Sir:

In your communication of July 30 you requested of the Corporation Counsel an opinion as to whether life-insurance brokers, live-stock brokers and commission men on South Water street should be required to take out licenses as brokers, under the provisions of Chapter 14 of the Revised Municipal Code of 1905.

Section 194 of said Chapter 14, defines a broker as follows:

“A broker is one who is engaged for others in negotiating contracts relative to property with the custody of which he has no concern.”

In common parlance many classes of persons are called “brokers” who, in reality, are merely “factors.”

Factors and brokers are both agents but with this difference: The factor is entrusted with the property of his principal; while the broker is not, but is only employed to make a bargain or negotiate a contract in relation to it.

In the case of *Braun v. City of Chicago*, 110 Ill., 186, appellant claimed to be a commission merchant and not a broker. The facts were stipulated “that Braun was engaged in selling, in the city, produce such as butter and eggs belonging to other persons when sent to him for that purpose;

that he sold to such persons as would buy; that he also negotiated sales of such produce for others without having possession of the property, and for such business so conducted by him he receives, as compensation therefor, a percentage on the gross amount of such sales. The court held that Braun was a broker because he negotiated sales of property of which he never had possession and, therefore, was required to take out a broker's license."

A person may act as a factor in some of his dealings and in the capacity of a broker in other dealings. Where a person dealing in grain, produce, merchandise or live stock obtains the actual possession of the property of his principal, he acts in the capacity of a factor, but where he does not obtain the custody of the property but merely negotiates contracts for purchase or sale he is a broker. The commission men on South Water street and the live-stock brokers ordinarily act as factors and thus are not required to procure a broker's license. However, if, in addition to their usual duties, they also act as brokers, they should be required to procure a license as brokers.

Life-insurance brokers are brokers within the meaning of the ordinance. In this case, it is merely a question of determining whether the person is acting as a broker or as an agent. The distinction between an insurance broker and an insurance agent is well stated in the case of *McKinney v. City of Alton*, 41 Ill. App., 508, on page 512 of the opinion, in which the court says:

"The term 'broker' or 'insurance broker,' is generally understood to mean a person who owes no allegiance to any particular corporation . . . He is free to procure insurance for others in any company he may select and to solicit and procure business and patronage for any insurance company or companies he may select; in short, we agree with counsel for appellee, that an insurance broker may be, for certain purposes and at certain times, an 'agent,' but an insurance agent *representing* corporations engaged solely in insurance business can not be an insurance broker or act as such."

It will, therefore, appear that ordinarily commission men

and live-stock brokers need not procure licenses; whereas, life-insurance brokers should obtain a license.

Yours truly,
 GEORGE E. DIERSSEN,
Assistant Corporation Counsel

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

AUGUST 13, 1907.

E. J. MAGERSTADT, ESQ., City Collector.

Dear Sir:

Your favor of the 10th inst., requesting an opinion of this department in the matter of the application of Edmund S. Timmons for a roller-skating rink license at No. 37 Seventy-fifth street, has been handed me for reply. Answering, I have to say the report of the license officer stating that "objection has been raised to the granting of this license by residents contiguous to the proposed rink" and recommending that the "license be not granted," and the letter of the applicant, both of which are attached to your communication, have been noted.

The power to grant a license has been expressly conferred upon the City Council by Clause 41, Paragraph 63, Article 5, of the Act for the Incorporation of Cities, etc., which provides that "the city councils in cities shall have the power to license, tax, regulate, suppress, and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and OTHER exhibitions, shows and AMUSEMENTS, and to revoke such licenses at pleasure," and Clause 58 of the same paragraph, article and act confers on it the power "to regulate places of amusement."

Chapter 24, Starr & Curtis' Rev. Stat., Art. 5; Par. 63.

The validity of an ordinance is not dependent wholly upon any single section or clause of a statute and may be derived from several grants of power.

Kinsley v. City of Chicago, 124 Ill., 359.

Gundling v. City of Chicago, 176 Ill., 340.

In the exercise of the power granted it, the City Council

of Chicago has passed certain ordinances relating to amusements, and, for the purposes of convenience and fixing the license fee, they have been divided into sixteen classes under the general title, "AMUSEMENTS."

Chapter 6 of the Revised Municipal Code of Chicago, 1905.

Article 1 of this chapter, paragraph 99 of the code, entitled, "CLASSIFICATION FOR LICENSE," enumerates and defines the various classes into which amusements are divided, and, among other things, says:

"All merry-go-rounds, revolving wheels carrying passengers, slides, ROLLER-SKATING RINKS, etc., shall belong to and be known as entertainments of the tenth class."

Paragraph 102, at page 33 of the Municipal Code, under the sub-title, "LICENSE FEE TO BE CHARGED WHERE ENTERTAINMENT IS NOT GIVEN IN LICENSED PLACE," fixes, among others, the license fee for entertainments of the tenth class. This latter power is expressly conferred upon the council by Clause 4, Paragraph 63, of the Cities and Villages Act, which, under the caption, "LICENSES," grants to it the power "to fix the AMOUNT, TERMS and MANNER of issuing and revoking licenses." Some dispute has arisen in the past as to the right of the Council to authorize the Mayor to issue licenses, and had the question not been authoritatively determined in favor of the city's chief executive I should feel constrained to a discussion of it here. As it is, our courts have held the action of the Mayor in this particular to be simply the FORM of exercising the power by the Council.

Swarth v. The People, 109 Ill., 621.

Gundling v. City of Chicago, 176 Ill., 340; affirmed in 177 U. S., 183.

In consonance with these decisions the City Council of Chicago has passed general ordinances requiring that all applications for license be made to the Mayor, except where it is otherwise expressly provided, and Paragraph 1330 of the Revised Municipal Code of Chicago, 1905, under the caption, "MAYOR'S DISCRETION," reads as follows:

"In all cases where it is not otherwise expressly pro-

vided, the mayor shall have power to HEAR and GRANT applications for licenses UPON THE TERMS SPECIFIED BY THIS ORDINANCE; and all licenses shall be issued to such person or persons as shall COMPLY IN ALL RESPECTS WITH THE PROVISIONS OF THIS ORDINANCE, and as the mayor, IN HIS DISCRETION, shall deem SUITABLE AND PROPER PERSONS TO BE LICENSED."

See also, Paragraph 1324, Chapter 35, Revised Municipal Code, 1905.

The ordinance applicable to the case under consideration is to be found on page 32, Article 1, Paragraph 101, of the Revised Municipal Code of Chicago, 1905, entitled, "AMUSEMENTS," under the caption, "APPLICATION FOR LICENSE—MAYOR MAY REFUSE—CAUSE FOR REFUSAL," which reads as follows:

"Any person, etc., desiring to produce, present, conduct, or offer for gain or profit any of the entertainments, exhibitions, or performances mentioned in any of the sixteen classes specified in this chapter, at any place within the city, other than within a duly licensed place as hereinafter provided for, shall make application to the mayor in writing, setting out the full name of the applicant, a description of the kind and class of entertainment he, etc., intends to offer, and the place at which it is desired to produce, present, conduct, or offer such entertainment, exhibition or performance. Upon the payment by such applicant to the city collector of the license fee hereinafter specified for the particular class of entertainment such applicant desires a license for the production or presentation of, the city clerk shall issue to such applicant a license authorizing him to conduct, produce, present, or offer the class of entertainment specified in such license, at the place described in such application and for the period of time specified in such license; provided, however, that if the place at which it is desired to offer such entertainment be not a fit or proper place and not conducted or maintained in accordance with the provisions of the ordinances of the city governing or controlling such places, or if the entertainment desired to be produced or offered be

of an immoral or dangerous character, or if the person making application for a license be not of good character, the mayor may refuse to approve such application and no license shall be issued by the city clerk, except upon the approval of the application therefor by the mayor."

It is very clear that the matter of granting a license to this applicant is a question to be determined by the Mayor. The alleged protest against granting the license by residents "contiguous to the proposed rink" and the report and recommendations of the license officer are not proper questions for the consideration of this department. This feature of the case should be presented to the Mayor, who is vested with a sound discretion in such matters. And while the reasons named in the ordinance applicable to the case under consideration, to-wit, that the place must be a fit or proper one, the entertainment neither immoral nor dangerous, and the person applying of good character, should and undoubtedly will be of great weight in considering the question of granting or refusing the license, still there is vested in the Mayor, unless he be "expressly restricted by the language of the ordinance," a discretionary power, which he may reasonably exercise in the granting or refusing of the same.

Harrison v. The People, 222 Ill., 150.

Krelzemann v. Dunne, 228 I. O. R., 31.

Answering specifically the questions embodied in the letter of Mr. Timmons to you, I would say, I am of the opinion that it is not necessary to subject the question of a license to a petition; second, the Mayor is the only person who can pass upon the question as to whether or not there be any obstacle at present in the way of granting said license; third, the opposition of near-by residents would be a question for the determination of the Mayor.

I am of the opinion, therefore, that the granting of this license is a matter vested in the sound, legal discretion of His Honor, the Mayor.

Yours very truly,

GEO. M. BAGBY,

Approved:

Assistant Corporation Counsel.

GEORGE W. MILLER,

First Assistant Corporation Counsel.

AUGUST 15, 1907.

JOSEPH DOWNEY, Esq., Commissioner of Buildings.

Dear Sir:

In a communication of the 9th inst. from your department, addressed to the Corporation Counsel, you request an opinion concerning the duty of your department in regard to the enforcement of an act entitled "An act providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts and other structures, and to provide for the enforcement thereof," approved June 3, 1907, and in force July 1, 1907.

You also direct special attention to Section 2 of this act, the terms of which conflict with the various provisions of the building ordinances of this city, and inquire further whether you should continue to issue permits under the building ordinances.

1. Answering first your query as to the duty of your department in regard to the enforcement of this act, we beg to advise that Section 7 thereof contains the following language:

"Provided that in all cities of the State, where a local building commissioner is provided for by law, such officer shall be charged with the duty of enforcing the provisions of this act, and in case of his failure, neglect or refusal so to do, the State factory inspector shall, pursuant to the terms of this act, enforce the provisions thereof."

Under this language of Section 7 it is very clearly your duty to enforce the valid provisions of this act.

2. Your inquiry as to Section 2 of the act raises a question of much greater moment. Attention is again directed to the language of the title of this act, which reads: "An act providing for the protection and safety of persons *in and about* the construction, repairing, alteration, or removal of buildings, bridges, viaducts and other structures," etc. It seems clear that the title of this act relates to the protection and safety of persons in and about buildings, bridges, viaducts and other structures during the time of construction, repairing, altering or removing, and has no relation to the

protection and safety of people in and about buildings, bridges, viaducts and other structures after the work thereon has been completed. In other words, the title of the act does not relate to permanent structures, but to the protection and safety of persons during the construction, repairing, etc. This construction of the title is borne out by an examination of every section of the act, except Section 2.

The language of Section 2, in so far as necessary to be here quoted, is as follows:

“If in any house, building or structure in process of erection or construction in this State (except a private house used exclusively as a private residence), the distance between the enclosing walls is more than twenty-four feet in the clear, there shall be built, *kept and maintained* proper intermediate supports for joists, which supports shall be either brick walls, or iron or steel columns, beams, trusses or girders, and the floors in all such houses, buildings or structures in process of erection and construction shall be designed and constructed in such manner as to be capable of bearing in all their parts, in addition to the weight of the floor construction, partitions and *permanent fixtures*, and *mechanisms* that may be set upon the same, a live load of fifty pounds for every square foot of surface in such floors,” etc.

It is clear that this section relates not to provisions intended for the protection and safety of persons *during* the construction, alteration, repairing or removal of buildings, but that it relates to their permanent construction.

Section 13 of Article 4 of the Constitution of this State contains this language:

“No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title.”

The purpose of this constitutional provision is well stated in the *People ex rel. v. Nelson*, 133 Ill., 565, where, speaking of this provision, the court said:

“Formerly the title to an act was considered no part of it, and although it might be looked to as a guide to the intent of the law-makers when the body of the statute appeared to be in any respect ambiguous or doubtful, yet it could not enlarge or restrain the provisions of the act itself, and the latter

might therefore be good when that and the title were in conflict. Nor was there any rule forbidding the incorporation into the same act of as many different subjects as the legislature might see fit, entirely regardless of whether they bore any logical relation to each other or not. While these rules prevailed, the enactment of laws became subject to very serious abuses. These in the main consisted, first, of incorporating into the same bill various measures having no proper relation to each other, so as to enlist in favor of the bill support which neither measure singly could obtain on its own merits. This resulted in a species of 'log-rolling' legislation, which was both corruptive of the legislature and dangerous to the State. In the second place, titles were often prefixed to bills which were inadequate or misleading, or which afforded no intimation whatever of the true nature of the measure proposed, thus deceiving the members of the legislature and the public. That these were serious evils can not be doubted, nor can we doubt the wisdom of those constitutional provisions which have been adopted for their correction."

In *Leach vs. The People*, ex rel. 122 Ill., 420, an act of the General Assembly was entitled "*An act to change the time of electing certain officers in a county therein named.*"

The main subject of the act was to change the composition of the board of supervisors; to diminish the number of members of the board as provided by the general Township Organization Law, and to change the mode of their election from towns singly to groups of towns. The question arose out of the constitutional provision of 1848, which is substantially the provision of the present Constitution. It was held that the main subject of the act was not expressed in the title, and hence the act was void. The court said (426) :

"This subject was not expressed in the title, nor was it in any way germane to the purpose which was expressed in the title. To change the time of electing certain officers signified that particular merely,—the change of the time of election,—and did not at all embrace the main object of the law. The title was deceptive and misleading, giving no intimation of the more important purposes of the act. Without

disregard of this constitutional requirement, we do not see that we can do otherwise than to hold this act to be violative thereof, and therefore void."

In *Allardt v. The People*, 197 Ill., 501, the title of the act read "An act to prevent buying, selling or fraudulently using passes upon railroads, steamboats or other public conveyances."

The first section of the act made it unlawful to buy, sell, give or transfer, in any manner, any pass, which, *by conditions expressed thereon, was not transferable*, etc. Thus the title of the act was to prevent buying, selling or using passes *generally*, while the first section of the act was limited to passes, which, by conditions expressed thereon, were not transferable, and it was held that the subject of this section was not expressed in the title, and hence was in conflict with the Constitution.

In *Milne vs. The People*, 224 Ill., 125, the title of the act was "An act for the *punishment* of crimes against children." The act then went on to *define* certain crimes against children, and made the doing of certain things punishable by law which theretofore had not been. It was held there was nothing in the title of the act to indicate that the act would contain a definition of a crime, and therefore that subject of the act was not embraced in the title; hence the act was void.

These provisions sufficiently illustrate the application of the provision in question of the Constitution. Applying them to the act now under consideration, it seems to me to be clear that Section 2 is not embraced within the title of the act. No one reading the title of the act would expect to find contained in the act provisions relating to the permanent construction of buildings. This section, therefore, in my opinion, is in conflict with the section of the Constitution quoted.

The question then arises whether the entire act must be held to be unconstitutional or simply Section 2. The act is so framed that Section 2 may be eliminated without affecting the other sections. The same section of the Constitution in question contains this language:

"But if any subject shall be embraced in an act which

shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

This language is too clear to require the citation of authority construing or applying it. Under this section the invalidity of Section 2 does not affect the remaining sections of the act.

In conclusion, I beg to advise you that, for the reasons stated, Section 2 must be held to be contrary to the Constitution and void, and therefore you should continue to issue permits under the city ordinances as heretofore.

Yours very truly,

GEORGE W. MILLER,

First Assistant Corporation Counsel.

AUGUST 16, 1907.

W. E. RAFFERTY, ESQ., Secretary, Civil Service Commission.

Dear Sir:

The Corporation Counsel has referred to me your request of the 12th inst. for an opinion as to whether an applicant, who is more than thirty-four years of age, who has served for three years or more on the uniformed force, and who has been discharged therefrom upon charges and after trial before the Civil Service Commission, is eligible to take the pending police examination.

Section 1 of Rule X of the Civil Service Rules, as amended, reads as follows:

"ORIGINAL APPOINTMENT: All original appointments on the police force shall be as second-class patrolmen. Every applicant for the uniformed force, in addition to the requirements specified in Section 1 of Rule III, must at the time of such examination be between twenty-four and thirty-four years of age, not less than five feet eight inches in height (in bare feet), and of a weight which shall fall within the limits prescribed, and have a quiescent chest measurement of not less than the figures given below, and shall be physically qualified to sustain the labors and exposures of a patrolman, as determined by the medical and physical examiner especially appointed by the Commission for the purpose of marking said examination. Provided, however, that applicants who have

served on the uniformed force of said Department for three years or more and who were separated therefrom without fault or delinquency on their part shall be admitted without reference to the maximum age limitations as herein provided."

Section 12 of the Civil Service Act provides:

"No officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination shall be removed or discharged, except for cause, upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission or by or before some officer or board appointed by said commission to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer and shall be forthwith enforced by such officer."

Under this provision of the statute a removal can be effected only through regularly conducted proceedings before the Civil Service Commission, and can only be *for cause*. The meaning of the word "cause" as used in the statute is well defined in *People vs. Fire Commissioners of City of New York*, 72 N. Y., 445-449, as "some delinquency, general neglect of duty or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for office." The words "fault or delinquency" as used in the proviso of the rule are comprehended in the term "cause" as above defined.

The Civil Service Commission, in making its finding in the case of a discharged employee, necessarily passes on the question of the sufficiency of the cause for removal and its decision on that question then becomes *res adjudicata*.

"The rule that forbids the reopening of a matter once judicially determined by competent authority applies as well to the judicial and quasi-judicial acts of public officers and boards as to the judgment of courts having judicial powers."

2nd Ed. Am. & Eng. Enc. of Law, Vol. 24, p. 723.

A question which is involved within the issues of a former controversy is conclusively settled, as between the

parties, by the decision in that controversy, whether the court in its judgment passed specifically on that particular question so involved or not.

U. P. R. R. Co. v. C. R. I. & P. R. R. Co., 164 Ill., 88.

“When a matter in controversy between parties has been submitted to a competent judicial tribunal, its decision thereon is final between the parties until it has been reversed, set aside or vacated, and the rule of *res adjudicata* applies not only to judgments of courts, but to all judicial determinations, whether made by courts in ordinary actions or in summary or special proceedings by judicial officers in matters properly submitted to their determination”

Brown v. Mayor, 66 N. Y., 391.

In the case of *Osterhoudt v. Rigney*, 98 N. Y., 222-234, it was held:

“When claims have once been passed on by a board of town auditors (a quasi-judicial tribunal) and rejected upon their merits, no power exists in a subsequent board to review that decision or reopen a matter once decided. The decision once made is as final as the judgment of the court.”

In the cases below cited claims of rights of preëmption of public lands had been determined before the registrar and receiver of land office who constituted a quasi-judicial tribunal having jurisdiction to hear, adjudicate and determine rights of preëmption. In each of these cases the Supreme Court of Illinois held that, it appearing that the land officers had determined the rights of preëmption, the matter became *res adjudicata* between the parties in each case and was held to be conclusive.

See *Bennett v. Farrar*, 2 Gillman, 598.

Gray v. McChance, 14 Ill., 343.

McGhee v. Wright, 17 Ill., 559.

Robbins v. Bunn, 54 Ill., 51.

The Civil Service Commission, being a body vested with the right to exercise a power with discretion to determine the cause for removal, is a quasi-judicial tribunal and under the authorities above cited. When it has once determined that an employee of the city has been guilty of conduct which constitutes cause for removal, such finding or determination

by the Commission becomes conclusive on the question of the sufficiency of such cause as between the individual and the city, and is *res adjudicata* and must be at all times so considered and treated by the Commission, even though the personnel of the Commission may have been changed since the trial or investigation, except, of course, in such cases where courts of competent jurisdiction have, by their judgment, ordered otherwise.

It is my opinion that an applicant for police examination, who is more than thirty-four years of age, and who has served on the uniformed force of the police department for three years or more, and who has been removed or discharged therefrom upon written charges and after trial by the Commission or by its duly appointed trial board, the findings of which have been approved by the Commission, unless such proceedings have been annulled by the final judgment of a court of competent jurisdiction, is not eligible for examination and can not, under the rules of the Commission, be lawfully permitted to take the examination.

Yours very truly,

CLYDE L. DAY,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

AUGUST 19, 1907.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

Answering your letter of July 16, 1907, *First*, in regard to what department of the city has jurisdiction and should give the orders to erect barricades or railings along the side of dangerous sidewalks, and your suggestion that this belongs to the department of buildings, will state:

Section 201 of the Revised Municipal Code makes it the duty of the Building Commissioner to enforce all ordinances relating to the erection, construction, alteration, repair, removal or safety of buildings; and Section 202 makes it his duty to see that the doors, stairways, corridors, exits or fire

escapes are sufficient means of exit in case of fire panic or accident, and in case any building is in an unsafe or dangerous condition, it is made his duty to take such action as is by ordinance provided in regard to such buildings.

I find nothing in the building ordinances which would indicate that the Commissioner of Buildings has any jurisdiction over the construction of sidewalks or the erection of railings or barricades along the side of dangerous sidewalks.

Second.—The question then arises: Who, if any one, has jurisdiction to order these railings or barricades along the side of dangerous sidewalks? Section 1863, Revised Municipal Code, provides that “the Commissioner of Public Works shall order the Ward Superintendents to take particular notice of defective and dangerous sidewalks and streets in their respective wards and instruct the men employed by the city as ward laborers to barricade all such sidewalks and streets and keep such barricades in place until such defective and dangerous sidewalks and streets have been substantially repaired or replaced by new pavements.” Section 1878, referring to the duties of the Superintendent of Streets, provides: “He shall have special charge of the streets, sidewalks and public ways of the city, and of the improvement and repair thereof, except where such repair or improvement of streets or sidewalks is to be paid for wholly or in part by special assessment.” I am of the opinion that this notice should be given by the Department of Public Works, and that it properly comes under the Bureau of Streets, one of the departments of the Department of Public Works.

Third.—The question naturally arises as to who should pay the expense of constructing these railings or barricades at the side of sidewalks elevated above the natural surface to such an extent as to render them dangerous. It has been held in numerous cases that a city is bound to maintain barriers at dangerous places, to prevent people from falling from elevated portions of a sidewalk to a point below.

City of Chicago v. Baker, 195 Ill., 59.

City of Joliet v. Shufeldt, 144 Ill., 403.

Thompson on Negligence, Vol. 5, p. 395.

City of Mt. Vernon v. Brooks, 39 Ill. App., 430.

Where a sidewalk is constructed according to a grade established by the city, and the city has thereby established a dangerous condition, the city has been held liable. I fail to find any Illinois cases holding the abutting property owner liable, unless some negligence on his part has been shown.

I find no provision in the city ordinances requiring the abutting property owners or the city to construct railings or barriers along the side of sidewalks elevated above the natural surface to such an extent as to render it dangerous, and I also fail to find any provision in the ordinances penalizing the owner or owners of the abutting property for failure to construct a railing or barrier.

Our State Legislature, in Cities and Villages Act of 1872, Chap. 24, Sec. 134 (Revised Statutes of Illinois, 1874), has made provision for the construction of sidewalks by special assessment wherever such local improvements are to be made wholly or in part by special assessment, and such council in cities, or boards of trustees in villages, shall pass an ordinance to that effect, specifying therein the nature, character, locality and description of such improvement; provided that wherever any such ordinance shall provide only for the building or renewing of any sidewalk, the owner of any lot or piece of land fronting on such sidewalk shall be allowed fifteen days after the time at which such ordinance shall take effect in which to build or renew such sidewalk opposite his land, and thereby relieve the same from assessment; provided that the work so to be done shall in all respects conform to the requirements of such ordinance.

An act was passed by the Legislature May 18, 1905, to provide additional means for the construction of sidewalks in cities, towns and villages, Sections 291 to 296, inclusive, Laws of Illinois, 1905, p. 97:

“291. SIDEWALK BY TAXATION. Sec. 1. That in addition to the mode now authorized by law, any city or incorporated town or village may, by ordinance, provide for the construction of sidewalks therein, on, along or upon any street or streets or part of street therein, and may, by such ordinance provide for the payment of the whole or any part of the cost thereof by special taxation of the lot, lots or

parcels of land touching upon the line where any such sidewalk or sidewalks shall be ordered, and such special taxation may be either by levying the whole or any part of the cost thereof upon each of the lots or parcels of land touching upon the line of such sidewalk, pro rata upon each of said lots or parcels, according to their respective values — the values to be determined by the last preceding assessment thereof for the purpose of State and county taxation; or the whole or part of the cost thereof may be levied upon such lots or parcels of land in proportion to their frontage upon such sidewalk or sidewalks, or in proportion to their superficial area, as may be provided by ordinance ordering the laying down of such sidewalk; and in case such ordinance shall only require the payment of a part of the cost of such sidewalk to be paid by a special tax as aforesaid, then the residue of such cost shall be paid out of any fund of such city, town or village, raised by general taxation upon the property thereof and not otherwise appropriated. And any such city, town or village may by one and in the same ordinance provide for the construction of sidewalks hereunder on two or more streets, or parts of streets, or on one or both sides of any street or streets: *Provided*, That such sidewalks are so connected, or otherwise related, as to constitute but a single system of improvement.

“292. WHAT ORDINANCE MAY PROVIDE. Sec. 2. Said ordinance shall define the location of such proposed sidewalks with reasonable certainty, shall prescribe its width, the materials of which it shall be constructed and the manner of its construction, and may provide that the materials and construction shall be under the supervision of and subject to the approval of some officer or board of officers of such city, town or village to be designated in said ordinance. Said ordinance may require all owners of lots or parcels of land touching the line of said proposed sidewalk to construct a sidewalk in front of their respective lots or parcels of land in accordance with the specifications of said ordinance, within thirty days after the mailing of notice of the passage of such ordinance, addressed to the party who paid the last general taxes on the respective lots or parcels; and in default thereof,

said city, village or town may furnish the materials and construct said sidewalk in accordance with said ordinance, or may enter into a contract for the furnishing of said materials and the construction of said sidewalk as hereinafter provided; and the cost of such part thereof as may be fixed in said ordinance may be collected as hereinafter provided; and it shall be lawful for such city, town or village to issue non-interest bearing vouchers in payment for such walks, payable solely out of the special tax herein provided for when the same is collected."

Section 293 of this said act provides that the cost of constructing sidewalks may be provided for by an ordinance which may "provide for the levy of said costs by the frontage, superficial area or assessed value; and further, if the owner of any lot, block, tract or parcel of land has failed, neglected or refused to construct said sidewalk in accordance with the provisions of said ordinance, said officer or board shall proceed to prepare a special tax list against said lots, blocks, tracts or parcels of land in front of or touching upon which said sidewalk has not been constructed."

A railing or barrier erected around a sidewalk where the established grade is above the surface of the ground, in my opinion, would constitute a structural part of the sidewalk, and I am also of the opinion that the Board of Local Improvements and the Department of Public Works have the right to specify that sidewalks hereafter to be constructed, where the established grade is above the surface of the ground, shall have guard railings or barriers around the side of said sidewalk sufficient to protect the public from falling off the same, and that the expense of constructing the same should be paid by special sidewalk assessment as a part of the general assessment for the construction of the sidewalk.

It has been held in *Bush v. City of Peoria*, 215 Ill., 515, opinion p. 517, that:

"The re-paving or re-grading of a street, irrespective of the question whether the original paving or grading was paid for by special assessments, has been generally regarded as a local improvement for which a special assessment could be authorized. . . . The General Assembly has delegated to

the city council the power to determine what is a local improvement. The delegation of power is to legislate generally upon the subject, and is open to the revision of the courts, and ordinances that, in view of the existing circumstances and contemporaneous conditions, are unreasonable, unjust and oppressive will be declared invalid."

I am of the opinion that the City Council may by appropriate ordinance provide for the construction of railings and barriers along the side of sidewalks already constructed where they are elevated above the natural surface to such an extent as to render such sidewalk dangerous, and I do not believe that our Supreme Court would declare such a provision in an ordinance unreasonable, unjust and oppressive.

I am of the further opinion, in view of the fact that no railing or barrier has ever been constructed and paid for by special assessment taxed on the property benefited thereby, that the cost of erecting said railings or barriers around said sidewalks could, by a special sidewalk assessment, be taxed to the property owners.

Yours truly,

WM. S. STAHL,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

AUGUST 20, 1907.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

Acknowledging the receipt of your favor of August 10, 1907, to this department, wherein you request an opinion for the guidance of the City Collector's office in the matter of issuing cigarette licenses, and enclose a communication to you from Mr. John J. Dolan, a retail tobacco dealer of this city, "wherein he raises the question as to the right of the city to charge \$100.00 for the privilege of selling cigarettes for a fractional period of the license year; he claiming that he should be charged pro rata," I beg to say, by way of pref-

ace, that while this department of the municipal government is commonly known as the "LAW DEPARTMENT," it is more accurately and properly designated, the "CORPORATION COUNSEL." There are occasions, no doubt, when the duties devolving upon it demand and require the assumption of a professionally partisan attitude upon a given question, such is necessarily its position in matters of litigation, wherein the city's interests involved are adverse or antagonistic to other parties in interest, but under circumstances such as are now under consideration, where the head of a department of the city government makes inquiry for his guidance or a citizen seeks to know the law that he may conform to and comply with its reasonable requirements, the functions of this department are quasi judicial, and its opinion is an honest endeavor to counsel and advise and to clearly interpret the law in a fair, just and an impartial manner.

Keeping this in view, permit me to advert to your inquiry and say, the information particularly desired by both you and Mr. Dolan, I apprehend, is an interpretation or construction of that clause in the ordinance relating to procuring a city license for the sale of cigarettes, which he quotes in his favor to you, namely, "at the RATE of \$100.00 per annum."

The same rules apply to the construction of ordinances as to statutes, and they do not permit the selection of an isolated phrase, separating it from the context or body of the text in which it is used, and of which it is a part, and give to it *any* interpretation of which it may be susceptible, standing alone. The reason for this is patent: Words or phrases take their true meaning from their relative positions in the context. This has been so frequently exemplified in actual experience in the practical affairs of life that the courts have, not infrequently, deemed it of the greatest importance to judicially define a single word. In illustration of this, I beg leave to call your attention to the first word of the phrase in question, namely, "AT," which has been judicially held to have a variety of meanings, according to its particular use.

Words and Phrases Judicially Defined, Vol. 1, p. 593.

An ordinance, like a statute, must be considered as a

whole, and an elementary rule of construction requires that all the parts of an act should be considered together and not each by itself.

Mason v. Finch, 3 Ill., 223.

Williams v. The People, 17 Ill. App., 274.

The intention of the legislative body enacting a law is the vital part, the essential of the law. The ordinance applicable to the case now under consideration constitutes Article IX of the Revised Municipal Code of Chicago, 1905, is entitled "CIGARETTES," and extends from Paragraph 1079, page 308, to Paragraph 1085, page 309, inclusive, and reads:

"1079. LICENSE, APPLICATION, FEE, BOND. Any person, or corporation, desiring a license to sell cigarettes or cigarette papers or wrappers, in the city, shall make written application for that purpose to the Mayor, in which shall be set forth the full name of the applicant and the location at which such sales are proposed to be made. Such application shall be accompanied by evidence that the applicant, if an individual, and the person or persons in charge of the business, if a corporation, is or are persons of good character and reputation, and if the Mayor shall be satisfied that such persons are of good character and reputation, and are suitable persons to be entrusted with the sale of cigarettes, he shall cause the City Clerk to issue a license to such applicant, upon the payment to the City Collector of a license fee, AT THE RATE OF ONE HUNDRED DOLLARS PER ANNUM; and upon such applicant executing the bond to the city, with sureties to be approved by the Mayor, in the sum of \$500.00, conditioned that the licensed person, or corporation, shall faithfully observe and obey all laws of the State of Illinois and ordinances of the city, now in force or which may hereafter be passed with reference to cigarettes; Provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimpson weed, belladonna, strychnine, cocaine or any other deleterious or poisonous drug or drugs.

"Such license shall authorize the person or corporation therein named to expose for sale, sell or offer for sale cigar-

ettes and cigarette papers and wrappers at the PLACE designated therein.”

Section 1080 provides for inspection and analysis; 1081 refers to sale without license, and fixes a penalty; 1082 refers to adulteration; 1083 deals with sale to minors; 1084 prohibits sale near school houses; 1085 fixes the penalty for violating any of the provisions of the ordinance in question.

I do not deem it necessary for the purposes of this opinion, to quote the entire ordinance verbatim, feeling satisfied that the paragraph quoted at length, together with the SUB-TITLES of all the other paragraphs of the ordinance, is sufficient to show that, taking it as a whole, there is nothing expressly providing or warranting an inference that the Council intended a division of the license year. The license year is the municipal year beginning on the first day of May of each year. The license year is divided into periods by clear and express terms in the case of saloon licenses, and in that of billiard tables, etc., it makes provision for the payment of a fixed amount for a period of six months or more, and one-half of that sum fixed, for a period of less than six months. Therefore, any attempt to divide the license year in this case must be independent of the fixed policy of the City Council as indicated by the above quoted ordinances and of any specific provision made in the ordinance under consideration, and can be only by construction or interpretation of the phrase quoted by your inquirer.

“The inquiry, when any uncertainty exists, always is, as to what the Legislature intended, and when that is ascertained, it controls.”

Silver v. Ladd, 7 Wall, 219.

“The INTENTION of an act will prevail over the LITERAL sense of its terms.”

Sutherland, Stat. Con., 1891, Sec. 219, page 290.

“The true meaning of any clause or provision is that which accords with the subject and general purpose of the act and every other part.” *Supra*.

In endeavoring to ascertain the intention of the Council in the passing of the particular ordinance under consideration, I beg leave to call your attention to Paragraph 1335 of

Chapter 35, entitled, License, page 375, of the Municipal Code, which is sub-titled, "WHEN LICENSE FEES ARE DIVISIBLE," and reads as follows:

"When SPECIFIC PROVISION is made anywhere in this (any license) ordinance for the issuance of a license FOR LESS THAN THE FULL ANNUAL LICENSE FEE, or, for the issuance of a license for a PART OR PORTION OF A LICENSE YEAR UPON THE PAYMENT OF A PROPORTIONATE AMOUNT OF THE ANNUAL LICENSE FEE, the amount to be so paid for such license shall be computed from the first day of the period during which such license is issued if the license year be divided into periods, or, if provision be made for monthly periods which shall be computed as running from the first day of the month in which such license was issued; Provided, that no person or corporation shall be entitled to the benefit of the provisions of this section who is engaged without a license so to do in the business for which he applies for license at the time of such application."

In the statutes of this State there is one relating to statutory construction and it appears to me that this paragraph might very appropriately be termed "An Ordinance for the Construction of License Ordinances." Applying it to the case under consideration, I would say, it requires, first, that the ordinance providing for the license make "a specific provision for the issuance of a license for less than the full annual license fee, or, for the issuance of a license for a part or portion of the license year upon the payment of a proportionate or pro rata amount of the annual license fee," and providing for its computation. The ordinance we are endeavoring to construe is entitled "Cigarettes." It is silent as to each and all of these conditions. Nowhere in it can we find any expressed or implied provision as to a division of the license year. By its terms, one attempting to divide it would have to elect between periods arbitrarily fixed, or arranged by proportion of time. If the contention made by Mr. Dolan were the true or correct one, it would be absolutely necessary to read into this ordinance arbitrarily fixed periods and proportionate amounts.

I am free to admit that, to the casual reader or layman, these words might very easily lead to the presumption that the Council contemplated the payment of a pro rata license fee for the privilege of selling cigarettes. But in addition to what has already been said in relation thereto, I would say, that while the words of an ordinance are generally to have a controlling effect upon its construction, the interpretation of those words is often to be sought from the SURROUNDING FACTS and PRECEDING HISTORY.

Siemens v. Sellers, 123 U. S., 276.

It is admitted that the power of the municipality to impose licenses and business taxes upon persons or corporations is not inherent but delegated by the State, and statutes granting it are strictly construed, but it was held in a very conspicuous case in this State, where the very question of the \$100.00 license fee for the privilege of selling cigarettes within the City of Chicago was directly under consideration, that legislation with reference to this matter was in the nature of a HEALTH regulation and that, therefore, the Council would have an inherent power to make special regulations as to its sale, and differentiate, upon the ground that it was an essential regulation touching the health of the people of the municipality.

Gundling v. City of Chicago, 176 Ill., 345.

The City Council has passed ordinances relating to the regulation of other businesses wherein it has seen fit to divide the license year into certain periods and grant leave to applicants to pay the license fee in pro rata periodical payments; and again, it has made provisions, in certain cases, that a fixed sum should be paid for a period in excess of one-half of the license year, and still another fixed sum for any part less than one-half of said year. But in each and every instance where this has been done, the ordinance dealing with and relating to that particular business has so provided in express, clear and unequivocal terms. Taking into consideration the preceding history of the cigarette question and the policy of the city government in relation to it, as evidenced by the terms in which this ordinance is couched and what may be termed our Supreme Court's contemporaneous construction of the

cigarette license fee ordinance itself, I am strongly of the opinion that it was not the legislative intent by using the expression "At the rate of one hundred dollars per annum" to encourage the business of selling cigarettes, and such a conclusion is, in my opinion, warranted and fully borne out by what we know or may easily ascertain of the popular estimation of cigarettes.

In the case of *Gundling v. City of Chicago*, 176 Ill., cited before herein, the objection was urged that the imposition of \$100.00 as a license fee for cigarettes was an unjust and unfair discrimination against this particular form in which tobacco is used, and the court, applying in spirit the rule as laid down in *Siemens v. Sellers*, 123 U. S., 376, and interpreting the ordinance by "surrounding facts and preceding history," said at page 348 of opinion:

"It is urged by appellant that the City Council has no right to single out a particular form of manufactured tobacco and provide for its regulation and require a license for its sale, without making the requirement apply to all the forms in which tobacco may be used. It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that PARTICULAR form of tobacco."

In the light of this decision, I beg leave to call your attention to Paragraph 1335, Chapter 35, of the Revised Municipal Code of 1905, entitled "WHEN LICENSE FEES ARE DIVISIBLE," and before quoted herein at length, as indicative of the city legislature's policy toward this special industry. Both of these ordinances are the enactments of the legislative department of the municipal government. The latter relates to all ordinances touching upon the question of licenses and they should be construed, where possible, with reference to it. It is a familiar rule of construction that if two ordinances, even though claimed to be inconsistent, can be construed so that EACH may be enforced, that course must be followed.

Cook County v. Gilbert, 146 Ill., 268.

Trausch v. Cook County, 147 Ill., 534-7.

Butz v. Kerr, 123 Ill., 659.

I am of the opinion that the words, "at the rate of," as used in the ordinance under consideration, are not intended as a provision for a pro rata payment of the license fee, but rather have reference to each license which the applicant for the privilege of selling cigarettes desires to obtain. The ordinance as a whole, and every part of it, must be construed with reference to Paragraph 1335, and there being no specific provision in it, fixing into what periods it was the legislative intent to divide it, no provision as to at what time any but the full license fee payment was to be made, I am further of the opinion, that when applying for a license for the privilege of selling cigarettes, applicant must pay, when he takes out a license, THE FULL LICENSE FEE OF ONE HUNDRED DOLLARS, WHETHER IT BE FOR THE PERIOD OF A FULL LICENSE YEAR OR A FRACTIONAL PART THEREOF.

To correctly interpret or construe a phrase or clause, it is absolutely indispensable to first ascertain which is the controlling word or words therein. In that phrase under consideration, "at the rate of one hundred dollars per annum," the controlling word is "Rate." Webster defines this word to be "the price or amount stated or fixed for anything," and it has been so defined judicially.

Raun v. Reynolds, 11 Cal., 14-19.

Applying this definition to the case now before us, and substituting the word "Price" for the word "Rate," the phrase would read "at the price of \$100.00 per annum," that is to say, the price of each license for the privilege of selling cigarettes within the corporate limits of the City of Chicago was \$100.00 per annum. This, in my opinion, is a correct interpretation of the true legislative intent. From what we know of actual conditions in Chicago now and at the time of the passage of this ordinance (a very valuable aid in the interpretation of ambiguities of this character), the surrounding facts and preceding history of the cigarette business, we can say that certain persons or a certain corporation conducts

a large number of retail cigar stores in this city, in each of which cigarettes are sold at retail, and where, under this ordinance, a separate license for each place of sale would be required, and it seems to me very clear that the City Council, thoroughly acquainted as its personnel is with the business conditions that obtain in this city, had this in view and seriously considered this feature in formulating the ordinance now under consideration. I am, therefore, of the opinion that it is the duty of your department, in the issuance of licenses for the privilege of selling cigarettes, to require that the sum of \$100.00 be paid as the license fee for the full license year, or, for any fractional part thereof.

Yours very truly,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

AUGUST 21, 1907.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

Your letter of August 19 on the above subject, addressed to the Corporation Counsel, together with the accompanying plat and application for permit, has by his direction been referred to me.

The application of the Hills-Benedict Linseed Oil Company for the permit is based upon a reservation made by the owners at the time of the platting of Green's South Branch Addition to Chicago in 1856. An examination of the abstract of title to Lots 16 and 17 in this addition (the lots owned by the applicant), and of the records in the Recorder's office, show that the original plat of Green's South Branch Addition was filed for record June 17, 1856, and recorded originally in Book 98 of Maps, page 90, and that a restoration of this plat made by order of the Circuit Court of Cook County is recorded in Book 9 of Plats, page 72. The plat contained the following reservation: "reserving the right to lay down and maintain one or more railroad tracks in each of the streets laid out in

said addition, together with all necessary switches, turnouts and turntables.” The records further show that, by an ordinance passed by the City Council March 18, 1878, Lumber street (street running parallel with the south branch of the Chicago river) was vacated and thereafter a part of the addition was resubdivided, the plat of the resubdivision being recorded March 28, 1878. Loomis street, which in the original subdivision extended only to Lumber street, was in the resubdivision extended in a straight line through to the south branch of the Chicago river, and in its extension beyond the southeast boundary of what had formerly been Lumber street it cut off a part of Lot 16, which had not been occupied by any street dedicated by the original subdivision. The plat of the resubdivision contains no reservation of a right to lay and maintain railroad tracks.

For the construction of that portion of the proposed tracks included in so much of Loomis street as was dedicated conditionally for public use by the original plat, I am of the opinion that the owner of Lot 16 is entitled to a permit, unless the laying of such tracks will, in your opinion, practically deprive the public of its easement in the street.

The reservation in the original plat made the dedication of Loomis street a conditional one, and it is well settled that in dedicating land to the public the dedicator may impose such reasonable conditions, limitations and restrictions as he may see fit, and in order to vest the easement in the dedicatee the terms of the dedication must be strictly complied with. The municipality takes the land subject to the burden imposed by the condition. Such condition, limitation or restriction, however, must not defeat the public right in the street, or deprive the municipality of police power.

Cyc., Vol. 13, p. 459.

Am. & Eng. Ency. of Law, Vol. 9, p. 475.

Elliott on Roads & Streets, 2d ed., par. 148.

Dillon on Mun. Corp., 4th ed., 629.

Mercer v. Woodgate, L. R. 5 Q. B., 26.

Stafford v. Coyney, 7 B. & C., 257.

Conkling v. Springfield, 39 Ill., 98.

Princeton v. Templeton, 77 Ill., 68.

Cohoes v. Delaware, etc., Canal Co., 134 N. Y., 397.

Pettibone v. Hamilton, 40 Wis., 402.

A reservation similar to the one under consideration of the right to lay and maintain railway tracks has been passed upon and upheld by the courts.

Ayers v. Pennsylvania Ry. Co., 48 N. J. L., 44.

Tallon v. Hoboken, 59 N. J. L., 383.

City of Noblesville v. Lake Erie & N. Ry. Co., 130 Ind., 1.

Ottawa, etc., Ry. Co. v. Larson, 40 Kan., 301.

Brunswick, etc., Ry. Co. v. Waycross, 91 Ga., 573.

And it has been held that the right reserved need not be exercised at once or within a limited time; the right is a continuing one.

City of Noblesville v. Lake Erie & N. Ry. Co., 130 Ind., 1.

For the construction of that portion of the proposed tracks included in the extension of Loomis street by the resubdivision of 1878, I am of the opinion that no permit should be granted. Loomis street, as extended by the subdivision, was dedicated absolutely and without condition to the public use. It extended through land which had been no part of the street under the original subdivision, and so it is not impressed with the burden imposed on the older part.

The right to lay railway tracks over the new part of the street can be given only by the City Council by ordinance duly passed for that purpose.

Chicago Terminal Ry. Co. v. Chicago, 220 Ill., 310.

Tudor v. The Rapid Transit Ry. Co., 154 Ill., 129.

A careful examination of the plat submitted by the Hills-Benedict Linseed Oil Company and a comparison of that plat with the plats shown in the abstract of title seem to show that a considerable part of the track proposed to be laid farthest to the southwest is upon that part of Loomis street dedicated by the plat of the resubdivision of 1878. For the reasons above stated no permit should be issued for the construction of this track.

The other proposed track is shown by the plats to be within the limits of Loomis street as originally platted, and for the construction of this track you may, therefore, issue a permit, unless you believe that the construction of the track

would practically deprive the public of its use of the street. A permit also may issue for the removal of the existing track.

In giving this opinion I am not unmindful of the fact that the Supreme Court of this State, following the holding of the Supreme Court of Georgia, is committed to the principle that where a municipality grants to a railroad company the privilege of laying one or more tracks upon or across a street the privilege granted must be exercised within a reasonable time. If within a reasonable time but one track is constructed the grant will be held to have been exhausted by the original construction.

Chicago Terminal Ry. Co. v. Chicago, 220 Ill., 310.

Savannah R. R. Co. v. Woodruff, 86 Ga., 94.

But this is not the case of a grant by the city of the right to lay tracks in a public street, but the case of such a right reserved by the owner of the land when the street was dedicated.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

AUGUST 22, 1907.

ROBERT KNIGHT, Esq., Deputy Commissioner of Buildings.

Dear Sir:

Your letter of the 16th inst. to this department, requesting an opinion as to your full duty in the matter of grandstands on the roofs of buildings being used for spectatorial purposes, has been referred to me for reply, and in answer thereto I would say that, in seeking to ascertain your full duty, very careful consideration should be given to both the particular ordinance dealing with the special subject in hand and any and all other ordinances relating in any manner or degree to it or incidents of it. The ordinance primarily applicable to the case now under consideration is known as Article XXV of the Municipal Code, 1905, and is entitled "MISCELLANEOUS PROVISIONS." Section 722 of said

ordinance, subtitled "ROOFS FOR SPECTATORIAL PURPOSES — PERMITS," is to be found on page 216, and reads as follows:

"It shall be unlawful for any person, whether owner, lessee, manager or person in control or having charge of any building within the city to permit the use of the roof of any house or building, whether free of charge or through admission fee, to any person as a place of observation or for spectatorial purposes, unless he has first obtained from the Commissioner of Buildings of the city a permit; Provided, however, it shall not be unlawful for any person, whether owner, lessee, or the person in control or having charge of such house or building, to permit the roof of any such house building to be used as a place of observation or for spectatorial purposes for a number of persons not exceeding ten, and when no admission fee is charged."

The use of a roof for observatory or spectatorial purposes is, by this section, inhibited, except where a permit therefor is first obtained from the Commissioner of Buildings. The proviso does not nullify this inhibition. It simply saves from the general inhibition something which, in its absence, would have been included.

Wayman v. Pomthord, 10 Wheat., 3.

Bank v. United States, 9 Wall., 227.

Boone v. Juliet, 1 Scam., 258.

Its office is to restrain the main provision of the ordinance, and except from it that which would otherwise be within it. The proviso recites that where no admission is charged, it shall not be UNLAWFUL, etc., to permit not more than ten persons to use the roof for spectatorial or observation purposes. It does not say that such use of a roof by such a limited number shall be lawful: the language is, "not unlawful." This means, that if the building has been properly constructed in accordance with the ordinances regulating the construction of buildings of its character such use of roof will not be unlawful. But the duty of ascertaining this fact is one devolving upon your department, and when, in any way, it comes to your knowledge that such use is being made of a roof without a permit first having been obtained,

it is your duty to have an inspection made of the building for the express purpose of determining whether or not it is being used for such purposes lawfully. This entire ordinance should be construed in reference to all building ordinances made, operative and in force for the salutary purpose of the public safety, and in my opinion for this inspection the city would be entitled to charge the usual and customary fee.

It is not merely the privilege of the city, but in my opinion its legal duty, to see also that, where cases assume to come within the terms of the proviso, the maximum number of persons be not exceeded. It is just as strongly incumbent upon your department to require the strict observance of the conditions of the proviso as of the main provision of the ordinance. It might be unreasonable to entirely prevent the use of one's own property for such purposes, yet the proviso is simply permissive of such use, and the fact that this ordinance deals with the question at all implies the claim by the city of a legal right to regulate it, and this assumption of regulatory powers imposes upon it the duty of ascertaining that the roof is in a reasonably safe condition for the purposes of the contemplated use, and this duty carries with it, in my judgment, the right to assess the usual customary fee for such services.

The succeeding section, to-wit, 723, of this ordinance relates to "INSPECTION AS TO SAFETY OF BUILDINGS" where application has been made for a permit. It reads as follows:

"Before issuing the permit as provided for in the foregoing section, the Commissioner of Buildings shall make an investigation as to whether such building is safe and secure enough to permit the presence of an estimated number of persons upon the roof thereof, and the permit so issued shall state the number of persons to be permitted on such roof. The Commissioner of Buildings shall see to it that every such roof is surrounded and inclosed with a railing or balustrade of sufficient height and strength to afford adequate protection."

This section, you will observe, requires additional safeguards against accidents from a considerable number of

persons on the roof. It is my opinion that it is mandatory, and before issuing a permit your department must insist that the applicant surround the roof to be so used with a railing or balustrade of sufficient height and strength to afford adequate protection to people permitted there.

Section 724 of this ordinance provides for an INSPECTION FEE. It relates solely to where a permit is applied for and the amount there named is the fee fixed under such circumstances only. For inspection otherwise, for instance under the conditions named in the proviso, you would be entitled only to the usual inspection fee.

Replying specifically to your inquiry as to your right to apply certain ordinances relating to exits and thickness of walls, I would say, my preceding remarks herein relative to construing the ordinance under consideration apply here. Section 299 of the Code, and 413 of the Building Ordinance, relating to buildings of Class IV, should be applied in the matter of exits; likewise Section 253 for Class I, in so far as its application may be reasonable, fair and just under the special circumstances and conditions of the particular case. But in all cases, it is your duty to fully satisfy yourself that any building is reasonably safe for all the purposes for which it is used, and in considering the question of safety you should take into consideration the particular use to which it is put and apply to it those sections of the building ordinances especially designed to apply to that particular class of buildings.

It is inseparable from the efficient performance of your duties that some discretionary power be vested in you in the application of the various ordinances relating to different parts of a building, and where a house is considered and intended to be and is used as a dwelling, and by reason of its close proximity to some enclosed ground or park devoted to public amusement its roof affords exceptional advantages of viewing the entertainment there given, and its owner, lessee, etc., sees fit to gratuitously accommodate a few selected friends, within the limits of the proviso of Section 722, the intelligent exercise of a legal discretion in the application of the building ordinances should be indulged.

Your full duty, however, is summed up in seeing that all buildings are reasonably safe for all the purposes for which they are used.

Yours very truly,

GEORGE M. BAGBY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

AUGUST 29, 1907.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

The Corporation Counsel has directed me to advise your department as to the obligation of the Pennsylvania Railroad Company and the Chicago, Milwaukee & St. Paul Railroad Company to construct a new viaduct of the same width as the modern bascule bridge which is to span the south branch of the Chicago river at Washington street.

Upon investigation, I find that the Chicago, Milwaukee & St. Paul Railroad Company are the lessees of the Pennsylvania Railroad Company, the former company's franchise extending no farther south than Kinzie Street, so that it may be disregarded in this proceeding. Upon a review of the authorities bearing on this question, I am of the opinion that the city, in the exercise of the police power, can compel the reconstruction of the viaduct by the railroad company so that it may conform in width with the proposed bridge, if such reconstruction is necessary in the subservience of public convenience.

Assuming that a viaduct of the width of forty-eight feet is necessary for the proposed accommodation of the public, and that the old bridge was not commodious enough for the increased traffic at this point, I desire to cite the following cases illustrative of the inherent power of a municipality to compel the reconstruction sought for.

First, as to the city's right to demand the construction of viaducts by railroad companies at street crossings over its tracks, see:

T. P. & W. Ry. Co. v. Deacon, 63 Ill., 91.

O. & M. R. R. Co. v. McClelland, 25 Ill., 140.

C. & N.-W. Ry. Co. v. City of Chicago, 140 Ill., 309 (and cases therein cited).

State v. R. R. Co., 33 Kan., 176.

Second, as to the city's right to demand a reconstruction of viaducts by the railroad company to meet increased traffic, see:

Cook v. Boston, 133 Mass., 185.

C. B. & Q. Ry. Co. v. People, 212 Ill., 103.

C. B. & Q. Ry. Co. v. Drainage Commrs., 200 U. S., 561.

Since the decisions in this State are harmonious that the police power lies dormant until exercised by the municipality by affirmative legislative action, it becomes necessary that an ordinance be drafted which will put in motion this force vested in the city.

People ex rel. v. Village of Crotty, 93 Ill., 180.

People ex rel. v. John B. Mount, Mayor, 186 Ill., 560.

Without an ordinance, a mandamus suit to compel the improvement would not lie.

In the case of *State vs. Railroad Company*, *supra*, it was held that, in order that an ordinance requiring a railroad company to construct a viaduct may be enforced by mandamus, *such ordinance must specify the method of construction*. Under this authority it will be readily seen that this department must be furnished with the specifications for the construction of this viaduct for incorporation in the ordinance. But while these specifications are being prepared, it might be advisable to send a notice to the Pennsylvania Company with a view of ascertaining its disposition. Enclosed you will find a form of notice which will doubtless serve this purpose.

If the company disregards the request of the city, kindly submit to this office the specifications for the proposed viaduct when completed, and the ordinance will be prepared.

Yours very truly,

HOWARD W. HAYES,

Approved: *Assistant Corporation Counsel.*

GEORGE W. MILLER,

First Assistant Corporation Counsel.

THE PENNSYLVANIA RAILROAD COMPANY, Chicago.

Gentlemen:

A new bascule bridge forty-eight feet in width will be constructed by the city over the Chicago river at Washington street. The viaduct spanning your tracks east and west of the bridge is a narrow structure which is entirely inadequate to carry the traffic when the new bridge is completed.

You are therefore notified and directed to prepare to construct a viaduct forty-eight feet in width to take the place of the present structure, and arrange the work in such a manner that the new viaduct can be opened to traffic simultaneously with the new bridge.

.....
Commissioner of Public Works.

AUGUST 30, 1907.

L. E. GOSSELIN, Esq., Deputy Comptroller.

Dear Sir:

I have before me your communication of the 12th inst. addressed to the Corporation Counsel, asking for an interpretation of Sections 1 and 2 of an Act entitled, "An act to provide for the contribution from interest on public school funds to the public school teachers' and public school employees' pension and retirement fund in cities having a population exceeding 100,000 inhabitants," approved May 24, 1907. (Laws of Illinois, 1907, p. 528). Section 1 of this Act provides, that neither the treasurer nor any other officer having the custody of public school funds of any city having a population exceeding 100,000 inhabitants shall be entitled to retain any interest accruing thereon, or any part thereof, but that such interest shall accrue and inure to the benefit of such school funds respectively, become a part thereof, and be paid the city treasury subject to the purposes of the Act.

Section 2 provides that the board of education of any such city, as to such funds raised by taxation levied by such city for school purposes, whether the same be for educational purposes or for building purposes, shall annually set aside all interest so added to such funds and contribute the same to the

public school teachers' and public school employees' pension and retirement fund now created or existing, or such as may be hereafter created pursuant to any law, with the limitation that the amount of such interest so contributed shall not, in any year, exceed one per cent of the sums so levied for such purposes.

The same session of the Legislature passed an Act to provide for the formation and disbursement of a public school teachers' pension and retirement fund in cities having a population exceeding 100,000 inhabitants, which act is here mentioned for the purpose of showing the creation and existence of the public school teachers' pension fund, into which it was intended by the Act here under consideration the interest on the public school funds should be paid.

Section 9 of Article 9 of the Constitution of 1870 provides in part: "For all other *corporate purposes* all municipal corporations may be vested with authority to assess and collect taxes."

This is the section of the Constitution under which authority is vested in municipal corporations by the General Assembly to levy and collect taxes, and it will be noted that the authority is limited to levying and collecting taxes for "corporate purposes." By Paragraph 202 of the chapter on Schools (Hurd's Rev. Stat. 1905, p. 1823) it is provided that, "For the purpose of establishing and supporting free schools . . . and defraying all the expenses of the same of every description; for the purpose of repairing and improving school houses, of procuring furniture, fuel, libraries and apparatus, and for all other necessary incidental expenses in each . . . city—the authorities of such . . . city shall be authorized to levy a tax annually upon all the taxable property of the . . . city not to exceed two and one-half per cent for *educational* and two and one-half per cent for *building purposes*," etc.

By Paragraph 119 of the chapter on Revenue it is provided that, "There shall be annually assessed and collected, at the same time and in the same manner as other State taxes, such rate of tax on the equalized valuation of the property of this State as is or may be provided by the laws concerning

free schools, which tax shall be denominated the 'State School Tax,' and the moneys arising therefrom be distributed in such manner as is or may be provided by the laws of this State concerning free schools, and no part of the fund raised by the aforesaid tax shall be diverted to or used for any other purpose than the support and maintenance of free schools in this State." It will thus be noted that, by these provisions of the chapter on Revenue and the chapter on Schools, the Legislature of this State has vested in the municipal authorities of cities power to levy and collect taxes for the purpose specified in the sections quoted,—this power, under the constitutional provision to which attention has been directed, being vested subject to the limitation that the taxes levied and collected must be for corporate purposes.

That taxes levied and collected for the support and maintenance of our public schools would be for a corporate purpose admits of no doubt, but the Act in question proposes to take the increase by way of interest on taxes levied and collected for public school purposes and use it in the payment of pensions to that class of our citizens who have been employed as teachers or otherwise in connection with our public schools.

There is but one city in this State with a population exceeding 100,000, and that is the City of Chicago: so that, in the discussion of this question, we may deal with this municipality. If, under the decisions of this State, taxes levied and collected for the support and maintenance of our public schools are levied and collected by our municipal government in its capacity as a municipal government, then it is perfectly clear that no portion of the moneys so raised can be paid into this pension fund unless it can be said that the payment of pensions to school teachers and school employees comes within the meaning of the words "corporate purposes." I do not believe that our courts will so hold.

However, under the doctrine of *Speight v. The People*, 87 Ill., 595, and *Fuller v. Heath*, 89 Ill., 296, it would seem that the municipal authority of this city, in levying and collecting school taxes, is but the agent of the State selected by the General Assembly as the instrument through which

the State obeys the mandate contained in Section 1 of Article 8 of the present Constitution to "provide a thorough and efficient system of free schools whereby all children of this State may receive a good common school education." In this view, it may be considered doubtful if the limitation contained in Section 9 of Article 9 of the Constitution has application to taxes levied and collected for school purposes.

But if it be conceded that in levying and collecting school taxes the municipal authority is not collecting taxes for a corporate purpose, but is acting as an agent of the State in the raising of revenue to support and maintain our public schools, there is another serious ground for questioning the validity of this Act.

It is true that "the power of taxation is one of the essential attributes of sovereignty and is inherent in, and necessary to, the existence of every government" (27 Am. & Eng. Enc. Law, 2d Ed., p. 583), and the general doctrine as stated in the books is, that the power of the State as to the mode, form and extent of taxation is unlimited save in so far as restrained by the provisions of the State or Federal constitutions.

But back of this general rule is a fundamental principle, which lies at the very threshold of this power of taxation, and that is, that the power to tax is "subject to the limitation that a tax must be laid for a *public purpose* only, and an imposition in the form of a tax for purpose of private interests is void and unconstitutional." (Am. & Eng. Encl. *supra*, p. 624). This question has been discussed at great length in the leading case of *Citizens' Savings & Loan Association v. Topeka City*, 20 Wall., 655 (87 U. S.). In this case the City of Topeka issued bonds to a private corporation to aid and encourage the company in establishing and operating bridge shops in that city. This was done pursuant to the terms of an Act of the Kansas Legislature. An action was brought to recover certain of the interest due, as evidenced by coupons issued in connection with these bonds, and it was held that there was no power in the Legislature of that State to authorize the issuing of such bonds, and that the Act in question and the bonds issued were void. The decision rested upon the fundamental principle referred to.

Speaking of the power of taxation the court said, p. 663:

“There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. . . .

“Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitations on the amount of tax to be levied or things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

“The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

“To lay with one hand the power of government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

“Nor is it taxation. A ‘tax,’ says Webster’s Dictionary, ‘is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state.’ ‘Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes.’ Cooley, Const. Lim., 479.”

After noting other authorities, the court concludes:

“We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a *public purpose*.

It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. . . .

"But in the case before us, in which the towns are authorized to contribute by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit, which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

See also, *State ex rel. v. Switzler*, 40 L. R. A. (143 Mo.), 280.

It was held in the Topeka case that issuing bonds to aid and encourage the establishing and operating of bridge shops in that city was for a private and not a public purpose.

In the *Switzler* case, by the terms of a Missouri statute, interest on taxes was set apart for the creation of a free scholarship fund, out of which was to be paid the expense of establishing and maintaining free scholarships in the State University. The Constitution of Missouri provides that "Taxes may be levied and collected for *public purposes* only," which is but expressive of the fundamental principle which obtains in the absence of any constitutional provision. The Supreme Court of Missouri held that the tax in question was levied for a purely private purpose and was in contravention of the Constitution of that State. If the creation of a fund to establish free scholarships for the purpose of educating the youth of our land is raising money for a private purpose, I do not see how it can be held that the creation of a fund for the payment of pensions to school teachers and other school employees is for other than a private purpose.

It may be said that no part of the funds raised by taxation is to be taken under the Act in question, but that only

interest accumulations on the moneys so raised is to be paid into the pension fund, but this same point was raised in the Switzler case, and in reply to it the court said, p. 287:

“It is perfectly evident, we think, that no distinction can be maintained between the fund and its annual increment.”

I am of the opinion that there is such grave doubt as to the constitutionality of this Act that I am constrained to advise that this interest be not paid into this pension fund until payment has been ordered by the courts. By following this course, it will enable the city, when proceedings to compel the enforcement of the statute in question are begun, to test in the courts the constitutionality of this Act.

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

SEPTEMBER 6, 1907.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

The Corporation Counsel has directed me to address your department concerning the work being done by the Chicago City Railway Company in Thirty-eighth street, and to advise you with reference to the further prosecution of the same.

I am informed that on the 22d day of August, permit No. 27163, in the form as follows, was issued to the Chicago City Railway Company by the Bureau of Streets:

“Permission is hereby granted to Chicago City Railway Company to install a single track on Thirty-eighth street, between Cottage Grove avenue and Langley avenue, and Langley avenue between Thirty-eighth and Thirty-ninth streets, with connections at Thirty-eighth street and Langley avenue, Thirty-eighth street and Cottage Grove avenue, Thirty-ninth street and Langley avenue, with necessary poles and trolley wires, all as shown on blue print No. 1226.

M. J. DOHERTY,
No. 27163. *Superintendent of Streets.*”

This permit was issued upon the application of the Chief Engineer of the Railway Company, in which application a

recital was made that the proposed work had been approved by the Board of Supervising Engineers.

In conformity with the requirements of Paragraph 90, Section 62 of the Cities, Villages and Towns Act, which requires that, before the right to lay down any railroad track in any street shall be extended to any electric railroad company, more than one-half of the frontage of the street shall consent thereto, a paper purporting to contain the frontage consents was filed in connection with the application. A question which I shall discuss below has arisen concerning this document.

(1) The Chicago City Railway Company is now operating under the ordinance of February 11, 1907, a part of which is Exhibit "A." Here is detailed a schedule of streets upon which shall be maintained and operated tracks, and a long list of streets is named, including Thirty-eighth street from Archer avenue to Central Park avenue.

The fourth paragraph of this ordinance, under the heading "Extensions" recites that:

"The Company shall not be authorized or obligated to construct any extension of its street railway system upon streets on which street railways are not located when this ordinance goes into effect until the city has granted to the Company whatever authority in addition to this ordinance may be necessary to comply with the frontage consent laws of the State of Illinois."

These two provisions are the only ones within the confines of the ordinance relating to the construction of extensions of the tracks of the Company.

As to the provision first above mentioned, we have to say that no authority is therein given the Railway Company to do work of any kind in Thirty-eighth street between Langley avenue and Cottage Grove avenue. This ordinance is a grant of power, and by every rule of law applicable should be strictly construed against the grantee. It further appears by the terms of the grant itself that the extension in Thirty-eighth street is unauthorized, since the construction is limited to the streets "specifically described" in Exhibit "A."

The second provision contemplates two prerequisites: First, authority from the City of Chicago. Second, a compliance with the frontage consent laws of the State of Illinois.

Authority from the city can be obtained by but one method. A grant of the use of the streets of the city is a legislative function in which the city must exercise its power by ordinance. The City Council alone has power to prohibit or regulate the use of the streets, and this power can not be delegated to any department or officer of the city. This rule of law has been established by a long list of cases in this State, and we believe the principle does not admit of successful contradiction.

• *Trotter v. City of Chicago*, 33 Ill. App., 206.

People ex rel. v. Mount, 186 Ill., 560.

Chicago & N. P. R. R. Co. v. City of Chicago, 174 Ill., 439.

Nazworthy v. City of Sullivan, 55 Ill. App., 48.

McQuillen on Municipal Ordinances, p. 493, and cases cited thereunder.

A rule equally well established is, that any order or permit which attempts to enlarge upon any ordinance is invalid and without force, for an act which amends, modifies or repeals a law should be of equal dignity with the act which enacts or establishes the law. See:

Am. & E. Ency. of Law, Vol. 17, p. 235-6.

C. & N. P. R. R. v. City of Chicago, 174 Ill., 445, and cases therein cited.

Hibbard, Spencer, Bartlett v. City of Chicago et al., 173 Ill., 91.

It follows, therefore, that inasmuch as the construction of the single track in Thirty-eighth street is not specified in or contemplated by the ordinance of February 11, any council order, resolution or department permit authorizing the Company to proceed with the work is absolutely void. I, therefore, beg to advise you that your department should prohibit further work in this street until a proper ordinance is duly passed by the City Council and approved by the Mayor.

(2) The objection has been urged by Mr. Stillman, an attorney representing 145 feet on Thirty-eighth street, that

the Railway Company has not obtained the majority frontage consents in Thirty-eighth street as a prerequisite to the issuance of any permit to do as provided for by the Section of the Cities and Villages Act above referred to. Mr. Stillman claims that the 90 feet on the northeast corner of Langley avenue and Thirty-eighth street, the 109.8 feet on the southeast corner of Langley avenue and Thirty-eighth street and the 98 feet on the southwest corner of Cottage Grove avenue and Thirty-eighth street should not have been considered in computing the required frontage, for the reason that the buildings on those particular lots face on Langley avenue and Cottage Grove avenue, respectively, and for that reason have no frontage on Thirty-eighth street.

We differ with Mr. Stillman in this contention, and we are of the opinion that these lots were properly considered in computing the number of feet consenting to the construction of the track in this street.

The three lots mentioned are corner lots. We are of the opinion that each of the lots has a frontage on each of the two streets. A case in point is, *City of Des Moines v. Dorr*, 31 Ia., p. 93, in which the court considered this exact situation as to a corner lot. The court used this language:

“The front of a lot is well known to be that part of the same which faces on a street or streets. It may front on one street only or it may front on two. What is the front of a lot is a question determinable by its facing upon a public street or streets. It will thus be seen that the lot had two fronts, as *every corner lot necessarily has*, because its face is opposite to and fronts on two different streets.”

Any other construction would deprive the owner of a corner of his control over his property, merely because a structure located thereon happened to face in a particular direction. It also follows that if he should hold that these lots had no frontage on Thirty-eighth street, then they should not be considered in determining the total frontage on both sides of the street. The procedure, we believe, would be both illogical and impracticable.

We are, therefore, of the opinion that the Street Railway

Company rightly considered the aforementioned lots in its estimation of the frontage consents it had secured.

Yours very truly,

HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 9, 1907.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

Your communication to the Corporation Counsel of August 29, 1907, in reference to auctioneers and secondhand dealers' licenses, has been referred to me for an opinion.

In reply to your first question, which is as follows: "Are owners of cold storage houses required to have auctioneer's license to auction off goods left in their storage houses?" I beg to say that in the 2d edition of American and English Encyclopedia of Law, Volume 3, page 488, auction and auctioneers are defined as follows:

AUCTION.—An auction is a public competitive sale of land or goods by outcry to the highest bona fide bidder.

AUCTIONEER.—An auctioneer is a person who conducts such sale.

In *Crandall vs. State*, 28 Ohio 479, 491, it was held:

"An auctioneer is a person who conducts a public competitive sale. He is supposed to adopt the occupation as a business and mode of acquiring pecuniary gain to himself, and the government demands a sum of money for the right to the exclusion of other persons exercising the occupation."

In the Cities, Villages and Towns Act, Article 5, Powers of the City Council, Section 1, Paragraph 91, gives to the council the power "to tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers and brokers." By virtue of such power, the following ordinance was passed, Chapter 8 of the Municipal Code, Auction and Auctioneers, Section 127.

"**PENALTY.**—Any person who shall sell or attempt to

sell at public auction in this city any real or personal property of any kind whatsoever (except under and by virtue of legal process or under and by virtue of a mortgage), without first having obtained a license therefor as herein required, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

There is no doubt in my mind that under the foregoing citations a cold storage house *could not* dispose of any goods at a public competitive sale except by a regularly licensed auctioneer.

During the present session of the Legislature, however, the Railroad and Warehouse Act was amended for the purpose of regulating the disposition of personal property held by warehouse men, and upon which they had a "lien for a claim which has become due . . . by a sale which shall be had in the warehouse where the lien was acquired, or at any public auction room or place in the county where such warehouseman is located."

Whether this statute would give the warehouseman the right to have goods auctioneered off except by one having an auctioneer's license to conduct sales such as you specify may be an open question in view of the fact that the ordinance specifically excepts such sales which are made "under and by virtue of legal process or under and by virtue of a mortgage," and our Supreme Court might hold that the enforcement of the warehouseman's lien would be practically the same as the enforcement of a mortgage lien, and the sale would therefore be exempt. However, the vocation of an auctioneer is one which is recognized by law as of great importance, because of the great opportunity for practicing fraud in the conduct of sales of this nature, and certain restrictions and conditions have been imposed by the ordinance, in order that the general public may be fully protected against fraud when purchasing at such sales, and I am strongly inclined to the opinion that sales conducted by warehousemen should have thrown about them the same safeguards as other public competitive sales, and that our courts would ultimately hold that they are not exempt under the ordinance.

Replying to your second question, "Do bankrupt and other goods ordered sold at auction by the court require auctioneer's license?" I am clearly of the opinion that a person selling bankrupt or other goods under an order of court is not required to procure an auctioneer's license.

Replying to your remaining question, I am of the opinion that, if any person is in the habit of buying goods at such sale and reselling at private sale, such person is, in legal contemplation, a secondhand dealer and is, therefore, required to procure a secondhand dealer's license before reselling goods purchased by him in the manner hereinbefore mentioned.

Yours truly,
ROBERT L. CAMPBELL,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 11, 1907.

GEORGE M. SHIPPY, Esq., General Superintendent of Police.

Dear Sir:

This department having been called upon by Sergeant Ward of your department for an opinion as to the right of owners of public automobiles to use the northeast corner of Monroe and State streets as a stand for their vehicles while waiting for or soliciting sight-seeing passengers, and the same having been handed me for reply, I have to say, that, by virtue of Clause 42, Section 1, Paragraph 62, Article 5, of the Cities, Villages and Towns Act, the Common Council of the City of Chicago is granted the power "To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, operators, expressmen, and all others pursuing like occupations, and to prescribe their compensation." Page 301, Hurd's Revised Statutes, 1906.

In the exercise of the power thus vested in it, the City Council has passed certain ordinances licensing, taxing and regulating the business now under consideration, and in Section 2288 of the Revised Municipal Code of the City of

Chicago, 1905, under the sub-title, "cab and hack stands established," says "Any vehicle licensed under the provisions of this article (1) may stand while waiting for employment, at any of the following places." It then proceeds to describe and locate in regular numerical order fifteen locations, which it designated "stands." These provisions limit the area within which such stands may be maintained.

A careful review of the particular locations designated fails to show that the point in question, to-wit, the northeast corner of Monroe and State streets, is included within the limits of any of these stands, but under the caption, "Stand 10," it is provided that they may stand "On all street corners designated by the Superintendent of Police, between the hours of 7 P.M. and 7 A.M. each night; provided no street corner shall be designated as a public cab and hack stand by the Superintendent of Police, unless the consent in writing to the establishment of such stand shall first be secured from the abutting owner or owners of the property immediately in front, or alongside, of which such stand is to be located; such consent to be filed in the Board of Inspectors of Public Vehicles, and provided further, that the street crossing shall be left free and unobstructed."

Article 2 of the Municipal Code of Chicago, 1905, is entitled "Public automobiles for passengers," and provides for their being licensed, etc., the same as hacks, cabs, etc. Within this article and relating exclusively to automobiles is Section 2307 of said code, which reads as follows: "The operator or person in charge or control of any vehicle licensed under the provision of this article shall have the right to stand with his vehicle on any vacant place within the limits of any of the places designated in this ordinance as public cab and hack stands; **AND NO PREFERENCE SHALL BE SHOWN BETWEEN DIFFERENT VEHICLES OF THE SAME CLASS AS TO A CHOICE OF POSITION.**

There is likewise a proviso following the definition of "Stand 15," which shows an intention to confine public automobiles for passengers to the stands thus established. Even the owner of the abutting property can not appropriate to his own exclusive use a portion of a street dedicated to the

public use; nor can the city devote a street, or any part thereof, to a mere private use. *Field et al. v. Bailing et al.*, 149 Ill., 356. *Penn. Co. v. Chicago*, 181 Ill., 299. The business concerned in the question before us, however, is a private business impressed with a public trust and may therefore, by the public nature of the employment, be characterized as quasi-public. It has a legal right to use the streets for the purposes for which they were intended, but, except within the limits fixed by the City Council, it has no right to use them as a stand. *Penn. Co. v. Chicago*, 181 Ill., 299.

The abutting property owner, however, has certain rights in the street not shared by the public at large, and which are special and peculiar to himself. These arise out of the very relation of his lot to the street in front of it, and are rights of property. Among these is his right of access to and from the street, subject only to legitimate public regulation. 2 Dillon Municipal Corporations, 4th Ed. Section 587 B and Section 656 A.

Having been advised by Mr. Mix that the owner's written consent has not been given to the occupancy of this locality as an automobile stand, I am of the opinion that the location under consideration can not be used by public automobiles as a stand.

Yours very truly,

GEORGE M. BAGBY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 11, 1907.

HON. FRED A. BUSSE, Mayor.

Dear Sir:

The Corporation Counsel has directed me to prepare an opinion as to the liability of the City of Chicago to Adrian C. Anson, hereinafter called the claimant, predicated upon a statement attached hereto and submitted by him to the Honorable Frank I. Bennett, which statement I believe to be

substantially correct, excepting in so far as it assumes that permit No. 10023 ever was valid, or that the securing of the necessary frontage consents after the permit had once issued gave it binding effect.

Claimant, through his attorneys, has submitted a number of points in support of his contention that the city is liable to him, which points I shall discuss in the order observed in the suggestions by claimant's attorneys.

1. The assertion is made that the City Council is nowhere given the power to legislate with reference to grandstands, since grandstands are not wooden buildings within the meaning of those words as used in Paragraph 62 of Section 62 of Article 5 of the City and Village Act relating to the powers of the City Council.

I believe that it would require no strained construction of this section of the statute to extend its effect to grandstands. In considering the intent of the Legislature, the evils sought to be regulated must be given due weight, and it is not inconsistent with sound reasoning to say that the word "building" as used above meant "structure" and included a grandstand. This would be the interpretation of this section if the rule laid down in *People v. Harrison*, 191 Ill., 257, were adopted. The court in this case said: "In construing ordinances no less than statutes, all general provisions, terms, phrases and expressions should be *liberally construed* in order that their true intent and meaning may be fully carried out; and where great inconvenience or absurd consequences would result from a particular construction, that construction should be avoided if possible." It would be absurd if the Council could not regulate a wooden structure, around which hundreds of people assemble, making the fire risk to the neighborhood much greater than it would be by the erection of any other kind of a structure that rests upon a foundation.

But we have another section of Article 5, "Of the Powers of the City Council," which, I believe, without question authorizes the enactment of Section 656 of the Revised Municipal Code, and that is Paragraph 66, which authorizes the City Council to pass and enforce all necessary police ordinances. This paragraph is known as the "general wel-

fare" clause, and under it there can be no doubt but that the erection of grandstands may be regulated by ordinance.

Dillon on Municipal Corporations, Secs. 145 and 405.

McQuillin on Municipal Ordinances, Sec. 470.

Baumgartner v. Hasty, 100 Ind., 575.

Kaufman v. Stein, 138 Ind., 49.

Brady v. Northwestern Ins. Co., 11 Mich., 425.

Knoxville v. Bird, 80 Tenn., 121.

I therefore conclude that the passage of the following section of the Revised Municipal Code was within the power of the City Council:

"Sec. 656. . . . Wooden grandstands or tiers of seats, commonly known and described as grandstands, may be erected within the fire limits where no part of any such structure shall be within sixty feet of any other building or structure, provided that the person or corporation desiring a permit for the construction of such a grandstand shall first obtain the consent in writing of the owners of a majority of the frontage on both sides of the street or streets on each side of the block or square in which it is desired to erect such grandstand."

2. I am of the opinion that there is nothing unreasonable in the provisions of this ordinance, and in this conclusion I differ with the claimant. In passing on the reasonableness of an ordinance, the object which it seeks to serve and the means of accomplishing that object should be given controlling effect. The object of the section above quoted is the preservation of property, and the method is by the regulation of the use to which the property may be put. There is no attempt made by this ordinance to confiscate or to seize the property of the claimant without due process of law. All that is sought for is the mere regulation of its use.

If this ordinance be a valid exercise of the police power vested in the city, there can be no successful attack made on this ground, for, in the absence of fraud or grossly unwarranted exercise of the police power, the courts have never disturbed an ordinance passed for the protection of the public, for the conservation of the property and lives of the citizens of a municipality.

“In questions of doubt the courts are inclined to defer to the discretion and judgment of the municipal authorities.”

North Chicago City Ry. Co. v. Lake View, 105 Ill., 207.

“Judicial authority to declare an ordinance unreasonable is a power to be cautiously exercised.”

Commonwealth v. Robertson, 5 Cush. (Mass.), 438.

“The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances, and hence the legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence.”

Standard Oil Co. v. Danville, 199 Ill., 50-54.

Swift v. Klein, 163 Ill., 209.

People v. Cregier, 138 Ill., 401.

Commonwealth v. Patch, 97 Mass., 221.

3. Claimant contends that Section 656 is void because uncertain, and urges that the words “block” and “square” used in the ordinance, when construed according to the rule laid down in Section 689 of the Revised Municipal Code, cover different areas. Section 689 provides:

“Whenever in this chapter a provision is made that frontage consents shall be obtained for the erection, construction, alteration, enlargement, or maintenance of any building or structure in any block, the word ‘block,’ so used, shall not be held to mean a square, but shall be held to embrace only that part of a street bounding the square which lies between the two nearest intersecting streets, one on either side of the point at which such building or structure is to be erected, constructed, altered, enlarged or maintained, unless it shall be otherwise specifically provided.”

I differ radically with the claimant, first, for the reason that Section 689 has no application to Section 656, inasmuch as the last mentioned section comes within the saving clause “unless it shall be otherwise specifically provided,” and secondly, for the reason that our Supreme Court, in the case of *Harrison v. People*, 195 Ill., 470, has held that the words “block” and “square” are synonymous, so that there can be no uncertainty as to what area is meant to be covered by Section 656. I am, therefore, of the opinion that Section 689

has no bearing thereon, and that any other construction would not avail the claimant, for by the ruling in the Harrison case no uncertainty could arise by the interchangeable use of the two words "block" and "square," whether this principle be applied to Section 656 or to Section 689.

4. Claimant's last contention is taken from the other side of the fence and is predicated entirely upon an erroneous supposition, that is, that the permit issued to him ever had any validity.

In his last contention he assumes that Section 656 is valid, and he asserts that the city, having accepted the fee and issued the permit, is now precluded by the doctrine of estoppel from setting up his failure to secure the necessary frontage consents.

Again I take issue with the claimant, for at no time did he ever have in his possession a valid permit. Under Section 656 no permit could be valid unless issued subsequent to the filing of the frontage consents. It is admitted that but one permit issued, and this before the frontage consents were filed. Until this condition precedent had been carried out, the building commissioner was incapacitated by a total lack of power and could issue no permit binding on any one, therefore all the liability that the claimant incurred was created by the issuance of a permit void of legality, since it was a grant given without authority. The doctrine that no estoppel can arise from the act of a municipal corporation officer done in violation of or without authority of law has been established by numerous authorities. These cases will afford ample illustration of the application of the principle and are on all fours with the question here presented.

Seeger v. Mueller, 133 Ill., 86.

Snyder v. Mt. Pulaski, 176 Ill., 397.

Hope v. City of Alton, 116 Ill. App., 117.

Since every man is supposed to know the law, I can find no reason, legal or equitable, why the City of Chicago should pay the claimant in satisfaction of a liability incurred through his non-observance of the ordinances of the city by himself in common with an official of the city. To hold otherwise would, in my opinion, result in an inferential approval by the

city of a violation of those ordinances. I would therefore advise that the Finance Committee disallow this claim, but that the amount paid for the permit (\$26.00) be tendered to Captain Anson.

Yours very truly,
 HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 12, 1907.

JOSEPH DOWNEY, Esq., Commissioner of Buildings.

Dear Sir:

Answering your verbal request for an opinion as to your right to grant a permit to construct pilasters which extend out over the lot line onto the sidewalk, a distance of from six to ten inches, comprising a part of the structural features of the building, at the northwest corner of Madison street and Western avenue, will state that if you find that this permit was inadvertently issued under the representation that they were not building out over the lot line, and, as a matter of fact, these certain pilasters or piers which comprise a part of the architectural features of the building do extend out over the lot line, I am of the opinion that it is your duty to notify the owner, architect or agent to stop all work on such portions of said building as extend out over the lot line onto the sidewalk.

There is no question as to your having jurisdiction over this matter, for in the act creating the Department of Buildings, Section 201, Revised Municipal Code, it was made the duty of the Commissioner of Buildings to enforce all ordinances relating to the erection, construction, alteration, repair, removal or safety of buildings, but, in this particular case, I think that the Superintendent of the Department of Streets has concurrent jurisdiction with you, in so far as the portions of this building extend out over the lot line onto the sidewalk.

Our Supreme Court decided in the case of *People v.*

Harris, 201 Ill., 327, where a bay window was constructed extending out over the sidewalk eighteen inches, that:

“The title to the streets is vested in the city, and it has the conservation, control, management and supervision of such trust property, and it is its duty to define and protect the title to such trust estate. The city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes, but must hold and control the possession exclusively for the public use for the purposes of travel and the like. The rule is, that all public highways from side to side and from end to end are held for the use of the public, and no other safe rule can be adopted.”

The court in the same opinion, commenting further on the question, said:

“If it be said that city authorities can, by ordinance or otherwise, permit the erection and maintenance of a structure extending three feet or eighteen inches into the street, then where shall we say is the limit? If they can deprive the citizens of a portion of the street, then what portion? And if it be said that it shall only be that portion that does not interfere with public travel, then must each obstruction and the extension be left as an open question to be determined in each case, as a matter of fact, whether there was an obstruction to travel and public use. It seems to us that the very suggestion carries with it its own answer, that there is no safe field of speculation other than to keep within the limits placed by the books, by saying that the streets in their entirety are public property exclusively for public use, and that they or any part of them can not be devoted exclusively to private purposes or private use.”

I find no later case modifying the opinion above quoted, and, applying the law as therein set forth to the facts in this case, I am of the opinion that it is your duty to see that no portion of this building, including the architectural features, such as pilasters or piers, extend out over the lot line onto the sidewalk.

I understand that a survey of this lot has been made by one of the engineers of the Department of Streets, and

would advise you before taking action to get that survey and be certain that you are correct in the assumption that said certain portions of said building, namely, the pilasters or piers, which comprise an architectural feature of the building and also in a sense a part of the structural features of said building, do actually extend over the lot line onto the sidewalk, and when you are convinced of this fact, I am of the opinion that it will be your duty to act as above indicated.

Yours truly,

WM. S. STAHL,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

SEPTEMBER 19, 1907.

GEORGE M. SHIPPY, ESQ., General Superintendent of Police,
Chicago.

Dear Sir:

Replying to your letter of September 11, asking for an opinion as to whether or not the distributing of literature similar to that attached to your letter is unlawful and in violation of Section 176 of the Revised Municipal Code of Chicago and of Sections 6 and 223 of the Criminal Code of the Revised Statutes of Illinois, I beg leave to say:

One of the circulars before me purports to be issued under the name of the Midnight Mission of Chicago, a society composed almost entirely of well-known ministers of the City of Chicago, dwelling particularly upon the criminality of vice and the ruin that it brings upon the body and brain and character of transgressors. The circular states that copies of the same have been distributed among many thousands of young men in the City of Chicago, and that the educational part of the work is carried on in friendly coöperation with the Chicago Society of Social Hygiene. Two other circulars purport to be published for free distribution by the Chicago Society of Social Hygiene, corporation organized under the auspices of the Chicago Medical Society, comprising two thousand physicians, for the educa-

tion of men concerning transmissible diseases and the consequent protection of wives and children from venereal contamination. Among the officers of said Association are Bishop Charles P. Anderson, of the Episcopal Diocese of Chicago, Dr. Frank Billings, Judge Julian W. Mack, James B. Forgan, president of the First National Bank of Chicago, and many others well known to the public.

It would appear that a society fostered by many of the leading divines, jurists and physicians of the city would of itself be a sufficient guaranty of its honesty of purpose, and that its sole object would be the uplifting of the morals of the community and the preservation of mankind. The work of these two associations is carried on solely by subscription, and it is claimed that many hundreds of thousands of circulars have been distributed in all languages throughout the country.

Section 176 above referred to is as follows:

"No person or corporation shall post or cause to be posted on any advertising wagons, or upon or in any place within the city where the same can be seen from the streets, alleys or other public places of the city, any advertisement, handbill or notice of any character whatsoever, giving or purporting to give information from whom or where medicine or remedies of any kind may be obtained for the cure, prevention or treatment of uterine diseases, or diseases peculiar to females; venereal diseases, or diseases of the genital organs; or nervous debility, impotence, sterility, or barrenness; gonorrhea, gleet, stricture, syphilis, affection of the prostate gland, abortion or miscarriage, or articles or means of preventing conception, under a penalty of not less than twenty-five dollars nor more than fifty dollars for each offense," and has, therefore, no application to the matter at issue.

Section 6 of the Criminal Code of the Revised Statutes provides a penalty for advertising abortifacient drugs and therefore would not apply.

Section 223 of the Criminal Code, under the heading "Obscene Books, Etc.," provides as follows:

"Whoever brings, or causes to be brought into this State, for sale or exhibition, or shall sell or offer to sell, or

shall give away or offer to give away, or have in his possession, with or without intent to sell or give away, any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, instrument or article of indecent or immoral use, or shall advertise the same for sale, or write or cause to be written, or print or cause to be printed, any circular, handbill, card, book, pamphlet, advertisement or notice of any kind, or shall give information orally, stating when, how, or of whom, or by what means any of the said indecent and obscene articles and things hereinbefore mentioned can be purchased or otherwise obtained, or shall manufacture, draw and expose, or draw with intent to sell, or to have sold, or print any such articles, shall be confined in the county jail not more than six months, or be fined not less than \$100 nor more than \$1,000 for each offense — one-half of said fine to be paid to the informer upon whose evidence the person so offending shall be convicted, and one-half to the school fund of the county in which the said conviction is obtained.”

Our lexicographers have defined the word “obscene” as, “offensive to modesty and decency; impure; unchaste, indecent, lewd; as, obscene actions or language; offensive to chastity, delicacy or decency; expressing or presenting to the mind or view something that decency, delicacy or purity forbid to be exposed.”

“Obscene,” as used in the Revised Statutes, Par. 3893, U. S. Comp. 1901, p. 2658, prohibiting the use of mails for obscene matter, means matter offensive to the common sense of decency and modesty of the community and which is of such a character as to deprave and corrupt those whose minds are open to such immoral influences. Citing U. S. v. Harmon, 45 Fed., 414; U. S. v. Clarge, 38 Fed., 732; U. S. v. Williams, 3 Fed., 484; U. S. v. Britton, 17 Fed., 731; U. S. v. Bennett, 24 Fed., 1093; U. S. v. Martin, 50 Fed., 918; U. S. v. Moore, 104 Fed., 78.

It does not appear to me that the language employed in these circulars is of that nature as to promote the violation of law and the general corruption of morals. On the contrary, every person who reads these circulars can not but

be impressed with the terrible results brought about by violation of the moral law, and hence would tend rather to purify than to corrupt the mind and subvert the respect for decency and morality. There is nowhere any suggestion of advertising for gain or of selling patent medicines for the prevention or for the cure of the diseases, but the Association appears to be endeavoring to enlighten the young men of the present generation with a knowledge of the disasters entailed upon themselves and their prospective families by venereal diseases. I am therefore of the opinion that the distributing of circulars similar to the ones in question would not be a violation of Sec. 176 of the Municipal Code of Chicago or of Sections 6 and 223 of the Criminal Code of the Statutes of Illinois.

Very truly yours,

ROBERT R. JAMPOLIS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 23, 1907.

WALTER H. WILSON, ESQ., City Comptroller.

Dear Sir:

Replying to your recent inquiry relative to the above entitled matter, I beg to advise you that these various sinking funds have been created, and are being maintained, in accordance with Section 12, Article 9 of our State Constitution of 1870, which provides as follows:

“No county, *city*, township, school district, or other municipal corporation, shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness. *Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall, before or at the time of*

doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

Substantially the same provision of the Constitution has been enacted in the Cities and Villages Act, as follows:

" . . . and before or at the time of incurring any indebtedness shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same."

Hurd's Revised Statutes, Chapter 24, Art. 5, Sec. 1, Par. 5.

You will note that the provisions of both the Constitution and statute are mandatory, and not discretionary, and it must therefore be held that the fund so created is a TRUST FUND and can only be used for the specific purpose for which it was created.

Aurora v. C. B. & Q. Ry. Co., 119 Ill., 246-249.

Clark v. Sheldon, 106 N. Y., 104-111.

Our statutes make the following provisions relative to City Treasurer:

"The treasurer shall receive all moneys belonging to the corporation . . . "

Hurd's Revised Statutes, Ch. 24, Art. 7, Sec. 5.

"All warrants drawn upon the treasurer must be signed by the mayor and countersigned by the clerk, stating the particular fund or appropriation to which the same is chargeable and the person to whom payable; . . . "

Hurd's Revised Statutes, Chapter 24, Art. 7, Sec. 11.

Our Municipal Code makes the following provision relative to the City Treasurer:

"He shall receive all moneys belonging to the city, and shall render at the end of each month, and oftener if required, a statement, under oath, to the City Comptroller, showing the state of the treasury at the date of such account, AND THE BALANCE OF THE MONEY IN THE TREASURY. Such statement shall set forth all the moneys received by him, and from whom, and on what account they shall have

been received; also, all moneys paid out by him, and on what account they shall have been paid."

All of which provisions, and the total absence of specific provisions relative to securities, seem to indicate quite conclusively that the City Treasurer was expected to handle MONEY, and that it was not contemplated that he was at any time to deal in securities or evidence of indebtedness.

The present and previous statutes relative to the finances of the city show that the Legislature is continually trying to draw the line more closely around all municipal funds, and it now is the duty of the City Council to annually make *specific* appropriations on which a tax levy is based and, in making these appropriations, the City Council must *specifically* state for just what purposes the money proposed to be raised by taxation is to be used, and it is the bounden duty of officers to see that the funds collected by virtue of such appropriations are used for the specific purpose for which the moneys have been raised. After the moneys have been raised, they are turned over to the City Treasurer and our Criminal Code provides that:

"Every person holding any public office (whether State, county or municipal), trust or employment, who shall be guilty of any palpable omission of duty, or WHO SHALL BE GUILTY OF DIVERTING ANY PUBLIC MONEY FROM THE USE OR PURPOSE FOR WHICH IT MAY HAVE BEEN APPROPRIATED OR SET APART BY OR UNDER AUTHORITY OF LAW, . . . shall be fined not exceeding \$10,000 and may be removed from his office, trust or employment."

Hurd's Revised Statutes, Chapter 38-208.

Which would appear to make it a rather serious offense for a City Treasurer to honor a warrant drawn upon him for moneys to be used from the sinking fund in the purchase of bonds, because that fund is appropriated, levied for, and is being maintained for the *specific purpose* of accumulating sufficient money, so that when certain bonds mature there will be sufficient funds on hand to pay the bonds. Therefore, it is the duty of the City Treasurer to have in that fund money and not securities; because he might not be able to realize

par for his securities at the time it became necessary to use the money. To invest in securities which have a fluctuating value and which the city may not be able at some future date to sell for sufficient to fully reimburse the fund may mean an impairment of that fund. In the case of *Kelley v. Minneapolis*, 30 L. R. A., 281-285, the court, in discussing the investment of sinking funds in the control of a municipality, said:

“One of the primary objects of the law in providing for and jealously guarding the sinking fund is to maintain the credit of the city, and enable it to borrow money, when necessary, on its bonds, at a low rate of interest, and thereby lessen the burden of the taxpayers. But if the city, by the consent of its council and the action of its board of sinking fund commissioners, can help itself to the money in the fund when its bonds are unsalable, and substitute for the money such bonds, the object of the law will be defeated and the sinking fund become the means of facilitating an increase of the debt of the city. True, there is no claim made in this case of any want of good faith on the part of the Council and the Board, and it may also be true that in this particular case it would be for the advantage of the sinking fund to purchase of the city its bonds direct, before they have been negotiated; but the evils which might result from a construction of the statute permitting this to be done are serious. The purpose of the statute is to guard against the possibility of such evils. When the provision of the charter relating to the sinking fund and the statute regulating the sale of municipal bonds are considered together, it is obvious that a sale by the city of its bonds to itself for its sinking fund would be a violation of the spirit, if not the letter, of the law.”

Some States have a constitutional provision directing the City Council to invest moneys in sinking funds in U. S. Government bonds, county or municipal securities, and the State of Texas has had considerable litigation on the subject by virtue of such a provision. *Elser v. City of Fort Worth*, 27 S. W. Rept., 739, appears to be the leading case in that State. In that case, the Treasurer of the City of Fort Worth refused to honor a city warrant drawn in favor of Blair & Co.,

drawn against the sinking fund in his hands, for the purpose of investing a portion of those funds in city bonds. That decision, however, has no direct bearing here, because of the provision of the State Constitution and of the charter of Fort Worth, except that the court argues that moneys in a sinking fund ought to be invested so as to accumulate interest.

In our own State, we have a statute governing sinking funds, if municipalities desire to certify their bonded indebtedness to the Auditor of the State, in which event the Auditor can, under the direction of the particular city council to which said fund belongs, invest the moneys in bonds issued by that municipality, which statute is as follows:

“That whenever any county, township, CITY, town or school district shall owe any bonded debt not due, which is registered in the office of the Auditor of this State, the board of supervisors, or board of county commissioners, town auditors, city council, town trustees, or school directors of such county, township, CITY, town or school district, as the case may be, may, by resolution spread upon their records, and certified to the Auditor, request said Auditor to create a sinking fund to meet any such debt, or any installment thereof, by the time the same shall become due and payable. Said resolution shall specify the principal amount to be so provided for, the time when the same shall become due, and the amount they desire raised annually to meet the same.

“Upon the receipt of such resolution the Auditor shall file in his office the same, and thereafter it shall be his duty, in certifying the amount of taxes to be raised within said district, to fix and certify a rate, to be denominated “Sinking Fund Tax,” sufficient to produce the amount annually required in said resolution, and the same shall be levied, extended and collected and paid into the State Treasury the same as other State taxes.

“The State Treasurer shall receive said taxes so collected and shall invest the same in U. S. Government bonds, or in the bonds of the county, township, CITY, village or school district, to which said fund belongs, and for which it is created, at the lowest price for which such bonds can be purchased, not, however, to exceed the par value and accrued

interest, and such county commissioners, supervisors, town auditors, CITY COUNCIL, town or village trustees, or school directors, SHALL HAVE THE RIGHT TO DETERMINE THE KIND OF BONDS THEY WILL AUTHORIZE TO BE PURCHASED, and to fix the maximum price that may be paid for the same, and, in case of the purchase of government bonds, then the treasurer shall receive the interest as it accrues on said bonds and reinvest it in the same kind of securities, and, in case of the purchase of the bonds for which the sinking fund is raised, then such purchase bonds shall be returned to the county, township, city, village or school district and be cancelled or destroyed by the proper authorities."

Hurd's Revised Statutes, Chapter 113, Section 34.

The fact that the proposed investment of the funds would inure to the benefit of the city, because of increasing revenues from interest, does not in any wise change the rights of the city in the premises. The fund is unquestionably a TRUST FUND, therefore, it must be conserved for the specific purpose for which it was created, and our statute provides that: "the treasurer may be required to keep all moneys in his hands belonging to the corporation in such place or places of deposit as may be designated by ordinance." The City Council, on November 26, 1906, passed an ordinance (Council Proceedings, 2110), directing the City Treasurer to deposit ALL moneys which he receives in one of the banks which may have been designated by the City Council as depositories. Thus all necessary legal steps have been taken to conserve the funds, and they could not possibly be invested without the Treasurer becoming personally responsible for honoring drafts drawn upon him for the purposes above indicated.

I am, therefore, forced to the conclusion that the city has no right to invest moneys in its sinking funds in bonds issued by the city.

Yours very truly,

EMIL C. WETTEN,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

OCTOBER 10, 1907.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

Your letter of the 3d inst., to the Corporation Counsel, transmitting a communication from Mr. W. R. Adams relative to sidewalk in front of 535 Belden avenue, has been referred to me for reply.

In his letter Mr. Adams contends that your notice to him to lower his sidewalk to conform to the established grade is nullified by reason of the fact of an order passed by the City Council on September 23, 1907, appearing on page 1622 of the Council Proceedings. This order reads as follows:

“ORDERED, That the Board of Local Improvements be, and they are hereby, directed to prepare and submit to this Council an ordinance for the establishment of a uniform grade on Belden avenue, from Clark street to North Park avenue, and for the improvement of said street with asphalt, combination cement curb and gutters; also for bringing the sidewalks on said street up to grade.”

There exists at the present time on said street a grade which has been duly established by ordinance.

It is a well settled principle of law that an ordinance can not be amended, repealed or suspended by an order or resolution, or other act by the Council of less dignity than the ordinance itself. *Chicago and Northern Pacific R. R. Co. v. City of Chicago*, 174 Ill., 439; *Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 173 Ill., 91.

In view of these decisions you still have full power and authority to act until the grade as now established is changed by an ordinance duly passed by the City Council.

Yours very truly,

GEORGE E. DIERSSEN,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

OCTOBER 15, 1907.

W. A. EVANS, M.D., Commissioner of Health.

Dear Sir:

Replying to your inquiry of recent date, relative to the above entitled matter, I beg to advise you that under the act of 1869 (Private Laws, Vol. 1, p. 358), creating the Board of South Park Commissioners, it was provided, among other things (Section 2):

“Said Board of Commissioners shall be a body politic and corporate and shall have and enjoy all the *powers necessary for the purposes of this act.*”

Section 4 provides for the selection by the Commissioners of certain lands therein described, etc., and then says:

“Which said land and premises when acquired, as provided by this act, shall be held, *managed and controlled* by them and their successors as a public park for the *recreation, health and benefit of the public* and free to all persons forever.”

Section 13 provides:

“The said Board shall have the full and exclusive power to *govern, manage and direct said park, to lay out and regulate the same*; to pass ordinances for the regulation and government thereof; . . . and, generally, in regard to said park, *they shall possess all the powers and authority* now conferred upon or possessed by the Common Council of the City of Chicago in respect to the public squares and places in said city.”

Previous to the creation of the Board of South Park Commissioners the powers of the Common Council to improve and control the public squares and places in said city, and to adopt all needful rules and regulations for their *management and use*, were plenary and complete, and, being such, the South Park Commissioners became possessed, by the act of the Legislature creating them, of all the power and authority possessed by the city, and the city was excluded from all power to govern, manage or control the parks, boulevards and streets within the park territory.

West Chicago Park Commrs. v. Chicago, 152 Ill., 392-405-406-407.

McCormick v. South Park Commrs., 150 Ill., 516, 522.

People ex rel. Wilson v. Salomon, 51 Ill., 37-50.

Wilson v. Sanitary District, 133 Ill., 443-465.

Kentucky v. Louisville, 8 L. R. A., N. S., 553.

Whether the maintenance of a restaurant by the South Park Commissioners is necessary and essential to the proper *government, management and control* of the parks, is a question which I believe ought to be determined in the light of present-day views as to just what a park should comprise and how it should be managed and controlled. Gymnasiums, wading-pools, toboggan-slides, dance halls, shower-baths, and even the maintenance of a herd of sheep, are all now considered proper, if not necessary, incidents of a well-conducted park. When large areas are under the control of park commissioners, such as Jackson and Washington parks, where large numbers of people are in the habit of spending the entire day or evening, a restaurant or place of refreshment might very properly be considered a necessary incident to the proper *management and conduct* of such parks, and, being such, I have no doubt the Commissioners would have the right and power to establish and maintain a restaurant or place of refreshment. I therefore do not believe it would be necessary for them to obtain a license and pay to the City of Chicago a fee for the privilege of conducting such restaurant within the park.

Whether a restaurant is essential in the proper management and control of a park must of necessity rest on questions of fact, which are only generally in our possession, but I think it safe to assume that a well-conducted place within the confines of a park, where citizens can secure a hot or cold drink and some light refreshment, adds as much to the comfort, health, happiness of the people as facilities for taking a boat ride, or a court on which "tennis" may be played.

Yours very truly,

EMIL C. WETTEN,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

OCTOBER 23, 1907.

TO THE COMMITTEE ON GAS, OIL AND ELECTRIC LIGHT.

Gentlemen :

In connection with the ordinance now pending before you, relative to the Commonwealth Electric Company and the Chicago Edison Company, you have submitted to this department for answer eight questions, which I have carefully considered and here transmit reply thereto.

The questions will be set forth and discussed in the order in which they were submitted.

1. "Has the Commonwealth Electric Company, under its present ordinance, the right to mortgage its franchise?"

The Commonwealth Electric Company ordinance was passed by the City Council on June 28, 1897. (Special Ordinances, Vol. 2, p. 1905.) Subject to the terms and conditions of this ordinance, the Commonwealth Electric Company was authorized to "construct, maintain and operate a plant or plants, and in connection therewith to construct, repair, maintain, operate and use in, through, upon, over and under the streets, avenues, alleys, sidewalks, public ways, tunnels and upon viaducts, and under the Chicago river, and its various branches within the City of Chicago, a line or lines of wire or other electrical conductors, to be used for the production, transmission and distribution of electricity for the purpose of furnishing light, heat and power and the transmission of sounds and signals or any or either of them."

Under the terms of Section 12 of the ordinance the rights and privileges granted were for the term of fifty years, from and after the acceptance thereof.

The Commonwealth Electric Company is a corporation organized under the general incorporation act of this State, known as Chapter 32 of the Revised Statutes.

The company accepted the ordinance, and for a number of years has been operating its plant thereunder. In the question now under consideration the ordinance is referred to as a "franchise." While the word "franchise" is commonly used in connection with rights acquired under ordinances of this character, it should be here stated that this ordinance is not a franchise.

In the case of *Fietsam v. Hay*, 122 Ill., 293, our Supreme Court, in determining what a franchise was, and whether a franchise of a bank incorporated under a special act of the legislature could be sold by order of court through insolvency proceedings, said (p. 294) :

“The word ‘franchise’ is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by *legislative* grant. . . . It is nothing more than the right or privilege of *being a corporation*, and of doing such things and such things only as are authorized by the corporation’s charter.”

Our Supreme Court has further said that corporate franchises in the American states emanate from the government or sovereign power; that a municipal body, as it is understood, possesses no power to confer a franchise and that “the **grant** or license given by an ordinance comes within no definition of a franchise.”

Chicago City Railway Company v. The People, 73 Ill., 541.

See, also :

The City of Belleville v. The Citizen’s Horse Railway Company, 152 Ill., 171.

City of Chicago v. Rothschild & Company, 212 Ill., 590.

The State v. Topeka Water Company, 61 Kan., 547.

It is necessary, then, to determine the nature and character of the rights and privileges granted by the City Council under an ordinance of the kind here under consideration.

In *The State v. Topeka Water Company*, *supra*, the city council of the City of Topeka passed an ordinance for the erection, construction and maintenance of waterworks in that city, under the terms of which the company was authorized to erect, establish, construct, maintain and operate waterworks; to receive, take and store, purify and distribute in and throughout the City of Topeka, water, and to extend aqueducts and pipes through any and all of the streets, avenues, alleys or public grounds, etc. In determining the rights acquired under that ordinance, the Supreme Court of Kan-

sas said that the ordinance accepted by the water company was in the nature of a contract.

Our own Supreme Court, in determining the rights of a telephone company under an ordinance passed by the City of Pontiac authorizing the company to use certain streets and alleys for the purpose of extending its telephone system, said that (p. 311) :

“The grant by the City of Pontiac of the right to use the streets, etc., is not a franchise, but a license or contract; but it is equally clear that when the corporation accepted the privileges and entered upon the right to use the streets, etc., it became a binding contract between the city and company which could not be revoked or rescinded except for cause.

The People ex rel. v. The Central Union Telephone Company, 192 Ill., 307.

In the City of Belleville case, *supra*, where the rights of a horse-railway company to maintain and operate its railway in the public streets of that city under an ordinance granted by the city was involved, the court said that if such a grant was for an adequate consideration, and accepted by the grantee, then the ordinance ceased to be a mere license and became a valid and binding contract.

Under the federal authorities this contract right is referred to as a franchise, but, under the established law of this State and by the weight of authority generally, an ordinance of the kind here in question is not a franchise within the strict meaning of that term, but is primarily a license which, when accepted by the company or acted upon by it, becomes a contract and vests in the company a contract right irrevocable except for cause.

It may then be next determined whether this contract right is property, and upon this question the law is likewise clear.

Referring again to the Topeka Water Company case, the Supreme Court of Kansas upon this very point said (p. 561) :

“The ordinances accepted by the water company were in the nature of contracts and were *property* within the meaning of the law.”

Our own Supreme Court in a number of cases has had occasion to determine this question.

In *Cicero and Proviso Street Railway Company v. City of Chicago*, 176 Ill., 501, where the court was called upon to determine whether the right of way, right of user and occupancy, etc., of the street car company under an ordinance authorizing it to use the public streets was subject to special assessments for local improvements, the court held that the right of way, right of user and occupancy, etc., which were but the company's rights under the grant contained in the ordinance there in question, constituted *property* of a fixed and immovable character like real estate, and that so far as benefited it should bear its just proportion of the cost of an improvement in the same manner and to the same extent as any real estate contiguous to the improvements.

Again, in *City of Chester v. W. C. & W. W. R. R. Co.*, 182 Ill., 382, the court held that the right of way granted by the city council to a railway company to lay its track in a street and operate its cars thereon is a property right and merely contractual, but subject to the same conditions, restrictions and limitations as any other property owned by other persons.

Section 5, of the General Incorporation Act, under which the Commonwealth Electric Company is organized, contains this language:

"They" (corporations) "may borrow money at legal rates of interest, and pledge their *property*, both real and personal, to secure the payment thereof."

Here is an express statutory authority to corporations to pledge, *i. e.*, mortgage, their property, and it has already been seen that the contractual rights acquired by corporations under ordinances authorizing the use of public streets, alleys, etc., constitute property.

While, however, this corporation under its charter may be authorized to carry on the business for which it was incorporated, the charter granted to it by the State gives it no right to use the public streets, alleys, ways and places of the city, for their control, under the city charter, is vested in the municipality and the right to occupy the city's public streets, alleys, etc., in the construction and operation of the plant

authorized by the company's charter can only be obtained from the city through its city council, and such right or privilege must be subject to such reasonable terms and conditions as the city sees fit to impose.

Discussing the right of a railway company to construct and operate its line in, under, or across a public street, our Supreme Court said:

"The assent of the city to the laying of the track of a railroad along or upon a public street in the city is a condition precedent to the right of the company to so construct its railroad, and until that consent is obtained the railroad company is without right or power so to enter upon or occupy the street. And the power or privilege may, when granted, be restricted by such reasonable conditions as the municipality may see fit to impose."

Chicago Terminal Transfer R. R. Co. v. City of Chicago, 220 Ill., 310-314.

"The right to occupy the streets of a city with a railroad track and propel cars thereon can only be obtained by consent of the city council and the council may prescribe the conditions and limitations under which license to occupy its streets may be granted."

City of Aurora v. Elgin Traction Co., 227 Ill., 485-497.

The principle applied to these cases involving the right of a railroad company to use the public streets or alleys of a city applies to other public-service corporations, including electric light companies.

While the general doctrine as to the right of a city to impose conditions under which its public streets and alleys may be used is as stated, the Supreme Court of Michigan, while not deciding, indicates a doubt about the right of a city council to limit or restrict the statutory right of a corporation to mortgage its property, including the rights and privileges granted under ordinances to use public streets (*Detroit v. Mutual Gas Light Co.*, 43 Mich., 594), but whether such limitation on the general doctrine exists need not be here determined, for there is no limitation upon the right of the Commonwealth Electric Company to mortgage its property,

including the rights and privileges granted by the ordinance in question, to be found in the ordinance.

The question of the committee is whether the company, under its present ordinance, has the right to mortgage, etc. This question I answer in the affirmative. While the question does not go beyond the right to mortgage, it would seem that in addition to the determining of this naked question the committee is concerned in knowing, and no doubt by the question intend to inquire, whether, under a mortgage, there could be a foreclosure and sale of the property covered by the mortgage which would carry to the purchaser the rights and privileges granted to the Commonwealth Electric Company by the terms of the ordinance, and, therefore, that question will be determined. It is to be noted in this connection that this grant runs to the Commonwealth Electric Company. The words "successors or assigns" do not appear in the ordinance. The question, therefore, is whether, under statutory authority to mortgage or pledge property without any provision in the statute providing for foreclosure and sale, the rights and privileges granted to this company by the ordinance in question, to construct, maintain and operate a plant or plants, and in connection therewith to construct, maintain, operate and use a line or lines of wires or other electrical conductors in, through, upon, over and under the streets, avenues, public ways, etc., of this city, will pass by sale, under foreclosure of a mortgage covering such rights and privileges by its terms, to a purchaser at such sale so that such rights and privileges may be enjoyed and exercised by such purchaser. Similar questions have been under consideration by the courts in numerous cases.

In *Palmer v. Forbes*, 23 Ill., 301, a railroad company by the terms of its charter was authorized to issue bonds and "secure the payment of the same by mortgage or deed of trust on the whole or any part of the road property," etc. The Supreme Court, in discussing the right acquired by the purchaser at a sale under a mortgage executed under that statutory power, said (p. 256) :

"The authority to mortgage a railroad, etc., implies the authority to sell the thing mortgaged and to convey to the

purchaser all needful powers to use the thing purchased in a proper and beneficial manner."

There was, in the grant of power involved in that case, no use of the words "successors or assigns."

In *New Orleans, etc., R. R. Co. v. Delamore, et al.*, 114 U. S., 501, the court was required to determine whether the rights acquired by a railroad company to construct, operate and maintain its road in the public streets of the City of New Orleans under an ordinance granted by that city, and which the court refers to as a franchise, would pass to the purchaser thereof at a sale in bankruptcy so that such rights and privileges might be enjoyed by the purchaser. By the statute of Louisiana railroad companies were authorized to borrow such money from time to time as might be required for the construction or repairs of the road, and that for these purposes the company might issue bonds or "their obligations secured by mortgage upon the franchises and all the property of said companies." In the course of the opinion the court said (p. 510):

"Where there has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchaser, . . . it follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale."

This doctrine is reaffirmed in *Vicksburg v. Waterwork Co.*, 202 U. S., 453, where the court said (p. 464):

"Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at foreclosure sale, although the corporate right to exist may not be sold. The power to mortgage the privileges and rights of the corporation must necessarily include the power to bring them to sale to make the mortgage effectual."

By the use of the word "franchise" in these cases the

court had in mind the rights and privileges granted by the ordinances there in question (which, as has already been seen, is not, strictly speaking, a franchise) as distinguished from the right to be a corporation.

See, also :

Detroit v. Mutual Gas Light Co., 43 Mich., 594.

Hovelman v. The Kansas City Horse Railroad Company, 79 Mo., 632.

The State v. Topeka Water Co., 61 Kan., 537.

To hold that a corporation may mortgage rights and privileges acquired under an ordinance, but that upon the foreclosure thereof such rights and privileges will not pass to the purchaser, is to hold that an attempt by a mortgagee to enforce his security under a mortgage by the sale thereof, is to destroy it, for lines of wire or other electrical conductors (which may be used for illustration) in, through, upon or under public streets, avenues, alleys, etc., without the right to use them in the prosecution of the business for which they were so placed, are of little value.

I am of the opinion that the Commonwealth Electric Company has the right to mortgage, together with its other property, the rights and privileges granted to it by that mortgage, and that upon foreclosure of such mortgage, such rights and privileges will pass to the purchaser thereof and may be exercised and enjoyed by him subject, of course, to the limitations and restrictions which the ordinance contains.

2. "Did the ordinance of June 11, 1906, increase the power of the Commonwealth Electric Company to *issue securities* or to *mortgage* its franchise?"

In answering the first question I have already indicated that, in my opinion, the company has the right, under its present ordinance, to borrow money and secure the indebtedness by mortgage on its plant, including the rights and privileges granted by the ordinance of June 28, 1897. This ordinance does not contain the words "successors or assigns."

Whatever effect the absence of these words may have upon the right to *sell* or *assign* the company's plant, together with its rights and privileges under the ordinance, and thus transfer to the purchaser or assigns the right to exercise such

rights and privileges, they are not necessary to the right to mortgage.

The ordinance of June 11, 1906, by its terms, would have amended the ordinance of June 28, 1897, so as to make the last mentioned ordinance run in favor of the "successors or assigns" of this company. The presence of these words in the ordinance of June 11, 1906, would have given to the company a right to sell or assign its rights and privileges under the ordinance of 1897, which, I am inclined to the view, it does not now possess, subject, however, to the limitation contained in the ordinance of June 11, 1906, that no transfer of such rights and privileges should be made at any time to any corporation organized under the laws of any *other* state than Illinois, etc., but, having already reached the conclusion that, under the ordinance of June 28, 1897, the company has power to borrow money and secure the indebtedness by mortgage of the rights and privileges granted by that ordinance, it follows that no greater powers in that regard are granted by the ordinance of June 11, 1906.

3. "Did such ordinance" (the ordinance of June 11, 1906) "operate as an extension of the Chicago Edison Company's franchise for a period corresponding to the time intervening between the expiration of its present franchise and the expiration of the present franchise of the Commonwealth Electric Company?"

Section of the ordinance in question contained this language:

"The City of Chicago hereby consents to a consolidation of said Chicago Edison Company and said Commonwealth Electric Company or to a sale and transfer of the business and property, including ordinance rights and privileges, of said Chicago Edison Company to said Commonwealth Electric Company at any time hereafter," etc.

As a matter of fact these two companies have recently consolidated, so that the question of what would have been the legal effect of the ordinance in question if the Chicago Edison Company had sold and transferred its business and property, including ordinance rights and privileges, to the Commonwealth Electric Company as the ordinance of June

11, 1906, would have authorized, need not be considered. If it be true that, without authority from the City Council, these two companies have not the right, under the ordinance of March 28, 1887, to the Western Edison Light Company (under which the Chicago Edison Company operates), and of June 28, 1897, to the Commonwealth Electric Company to consolidate — and this question will hereafter be determined — the city, by the ordinance of June 11, 1906, expressly consented to a consolidation. This consolidation might have been under a new corporate name, or it might have been under the name of either of the constituent consolidated companies. The consolidated corporation would succeed to the rights, privileges and immunities subject to the limitations and restrictions contained in the ordinances granted to the constituent companies.

It is my opinion that, in the absence of an express limitation provision in the ordinance of June 11, 1906, a consolidation of these two companies would not extend the life of the ordinance of March 28, 1887, to the expiration of the life of the ordinance of June 28, 1897.

The doctrine announced by the United States Supreme Court in the cases of *Tomlinson v. Branch*, 82 U. S., 460, and *Central R. R., etc., Co. v. Georgia*, 92 U. S., 665, would seem to sustain this conclusion.

But in addition to this the ordinance of June 11, 1906, contains this clear language:

“Nothing in this ordinance contained shall be understood to operate in any way, directly or indirectly, to extend or keep in force either said ordinance of March 28, 1887, or said ordinance of June 28, 1897, beyond the time respectively provided in them for their respective termination.”

I, therefore, answer this question in the negative.

4. “Under the present ordinance of these companies is there anything to interfere, legally, with the consolidation of these companies at the expiration of the present franchise of the Chicago Edison Company?”

5. “Under the present ordinances is it possible for these companies to consolidate before the expiration of the

Edison Company's ordinance without further action of the Council, and if so, would such consolidation carry with it the liability on the part of such consolidated company to pay three per cent compensation on the gross receipts of the consolidated company?"

These two questions may be considered together and they divide themselves into two parts — (a) the question of compensation, and (b) the question as to consolidation.

By the terms of the ordinance of June 11, 1906, in case of consolidation, compensation would have been required, not only upon the business carried on under the ordinance to the Commonwealth Electric Company, but upon the business carried on under the Chicago Edison Company's ordinance as well.

By the direction of the committee, and prior to the consolidation, I was engaged with the general counsel for these two companies in the preparation of an ordinance to be submitted to your committee. By the terms of this ordinance payment of such compensation was provided for. The changed situation will require a revision of this ordinance, which will include a like provision. Inasmuch, therefore, as the disposition and consent of these two companies to pay compensation on the total business transacted is thus evidenced, it would seem unnecessary to determine the question of the city's right to compel payment of compensation upon so much of the business as is transacted under the Edison Company's ordinance, and I, therefore, refrain from discussing that question.

The branch of the two questions which relates to consolidation inquires as to the right of these companies under their present ordinances to consolidate at the expiration of the ordinance of March 28, 1887, which is the ordinance meant when spoken of as the Edison ordinance. Inasmuch as since the questions here under consideration were submitted to this department these two companies have consolidated, I assume that the committee, if now framing the questions, would desire to know if there is power, without additional action by the City Council, to consolidate now, rather than whether such consolidation can be made at the expira-

tion of the Edison ordinance, and it is to that question I shall address myself.

There is nothing in the ordinance of June 28, 1897, to the Commonwealth Electric Company which bears in any way upon this question. In other words, the ordinance contains nothing which may be considered as authorizing that company to consolidate with any other company, nor are there any words of restriction contained therein. The same must be said of the ordinance of March 28, 1887, to the Western Edison Light Company, unless the proviso found in Section 1 thereof, and hereafter to be considered, is to be construed as a limitation or restriction upon that right.

These two companies are organized under an act of the General Assembly of this state entitled "An Act Concerning Corporations," in force July 1, 1872, and known as the General Incorporation Act (Chapter 32, Illinois Revised Statutes). By the terms of an act entitled "An Act to provide for changing the names; for changing the place of business; for increasing or decreasing the capital stock; for increasing or decreasing the number of directors; for enlarging or changing the business for which the said corporations were formed, and for the consolidation of incorporated companies," in force March 26, 1872, as amended by an act in force July 1, 1889 (Hurd's Revised Statutes, 1906, p. 507), it is provided:

"That whenever the board of directors . . . of any corporation existing by virtue of any general or special law of this state, or any corporation hereafter organized by virtue of any law of this State, may desire . . . to consolidate said corporation with any other corporations now existing or which may hereafter be organized, they may call a special meeting of the stockholders of such corporation . . . for the purpose of submitting to a vote of such stockholders . . . the question of such change of name . . . or to consolidate with some other corporations, as the case may be, . . . and provided, further, that the provisions of this act, in reference to the consolidation of corporations shall only apply to corporations of the same kind and engaged in the same general business and carrying on their business

in the same vicinity, and that no more than two corporations now existing shall be consolidated into one, under the provisions hereof, except in the cases of corporations other than those conducted for profit."

By the terms of Section 4 of this latter act, it is provided that in case two-thirds of the votes represented by the whole stock of such corporation are in favor of the proposition, and upon the filing with the Secretary of State, and with the recorder of deeds of the county where the principal office of the corporation is located, of certificates as therein provided such "consolidation with some other company shall be and is hereby declared accomplished in accordance with said vote of the stockholders." This statute in its present form, in so far as it relates to the consolidation of corporations, was in force prior to the enactment of the ordinance of March 28, 1887, and has continued in force to the present time. Corporations are the creatures of the State, organized under general or special laws. They have such powers and such only as are granted to them by the State and in the absence of a grant of such power, they have no authority to consolidate. Here, however, is a clear and express authority contained in the statutes for such consolidation. While the charter granted to them by the State authorizes them to carry on their business according to the terms of their respective charters, it gives them no permission or authority to occupy any of the public streets or alleys of the city. That authority must be obtained from the City Council, and it is the statement of a general principle that the city in granting such authority may impose such reasonable conditions and limitations as it sees fit. Whether or not the city, by ordinance, could take away from these companies the statutory authority to consolidate, is a matter which need not be here determined, for it is perfectly clear that no such restriction is to be found in the ordinance of the Commonwealth Electric Company, and, if I am right in the view I have taken of the proviso contained in Section 1 of the ordinance to the Western Edison Light Company, no such restriction is therein contained.

This brings me, therefore, to a consideration of that proviso. Its language is:

“Provided, however, that said company and its successors or assigns shall not have the right to *sell* or *lease* to any other person or corporation any conduit, duct, wire or electric conductor, or part of the same, which may be laid by virtue of this ordinance, nor shall any of the rights or privileges hereby granted be sold in part or leased in part to any other person or corporation whatsoever.”

Special Ordinances, Vol. 2, p. 127.

As already stated there has been a consolidation between these two companies under the statute referred to. It will be noted that the proviso prohibits a *sale* or *lease* only. A consolidation is neither a sale nor lease. Our Supreme Court in the *Ashling* Case, 160 Ill., 373, recognized a clear distinction between a consolidation and a purchase by one company of all the property, rights, privileges, franchises, etc., of another; and in the *Archer* Case, 102 Ill., 493, the court holds that authority to consolidate confers no authority or power to lease, thus recognizing a distinction between a consolidation and a leasing. This proviso, therefore, is not a limitation upon the right to consolidate, and it follows that neither of the two ordinances now in question contains any limitations upon that right; so that, whatever may be said of the power of the city to take from these companies a statutory right to consolidate as a condition under which they will be permitted to occupy the public streets and alleys of the city, nothing of the kind has been done in either of the ordinances in question, and I am, therefore, compelled to advise you that these two companies had the power to consolidate without authority from the City Council.

6. “Is competition a circumstance which warrants discrimination in rates?”

In 20 Cyc. P., 1159, it is said that:

“The manufacture and distribution of gas for light, fuel, or power, by means of pipes, or conduits placed under legislative authority in streets or other public ways, is a business of a public character.”

So it has been held in *People v. Chicago Gas Trust Company*, 130 Ill., 268, 303, and in *Portland National Gas and Oil*

Company v. The State, ex rel., 135 Ind., 54 (21 L. R. A. 639), and the same principle applies to electric light companies.

Hangan v. Aldina Light & Oil Company, 14 L. R. A., 424.

It is well, therefore, at the outset, in connection with this question, to determine what are the duties and obligations of these public-service corporations to the public, having in mind, particularly, the rates which they are permitted to charge for service furnished.

The General Assembly of this State at the session of 1905 passed an act authorizing the city to prescribe by ordinance the maximum rates and charges for the supply of gas and electricity for power, heating and lighting furnished by any individual or corporation to such city and the inhabitants thereof. (Hurd's 1906, p. 445.) But there is no statute in this State specifying what rates may be charged.

The obligation resting upon a public-service corporation operating under a grant from a municipality, in the absence of express provisions therein governing the same, is to furnish service to all of the inhabitants who may apply therefor at *reasonable* rates, and without *unjust* discrimination, subject to such reasonable rules and regulations in regard thereto as the company may see fit to prescribe.

In 15 Cyc., p. 470, it is said:

"Electric light companies can not *arbitrarily* charge different prices to different patrons for light, but must treat all customers without *unjust* discrimination."

Attention is called to the two limitations contained in this statement, namely, there can not be an *arbitrary* difference in the prices charged patrons, and there can be no *unjust* discrimination; thus inferentially recognizing that there may be a discrimination between patrons provided it be upon some basis not purely arbitrary and not unjust.

The Supreme Court of Indiana has announced the doctrine thus:

"The rule of common law so uniformly recognized and enforced declares that persons, either artificial or natural, engaged in conducting a business which is public in its character or nature, or which is impressed with a public interest, can not arbitrarily select their patrons, but must serve impar-

tially, or on equal terms and at reasonable rates all who apply for service. It is true that this rule can not be interpreted as requiring absolute uniformity of rates or prices, nor as prohibiting, under any and all circumstances, a discrimination by performing services for one person at a price or rate lower than that exacted of others. This doctrine is more frequently enforced in respect to railroad companies and other common carriers, and while the latter can not arbitrarily select their patrons still they are not prohibited from undertaking the transportation of wares or goods of one patron at an unreasonably low rate, or from conferring upon him other practical advantages in respect to such transportation not extended to his competitors or to the public in general."

Richmond Natural Gas Company v. Clawson, 155 Ind., 659. (51 L. R. A., 744-746.)

Our own Supreme Court, in *Snell v. Clinton Electric Light, Heat and Power Company*, 196 Ill., 626, has recognized this doctrine to be the true one, as will appear from the following language taken from the opinion (p. 631):

"Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without *unjust* discrimination. While it is not bound, in the absence of statutory enactments, to treat all its patrons with *absolute equality*, still it is bound to furnish light at a *reasonable* rate to every customer and without *unjust* discrimination."

It is a rule of the common law as applied to common carriers that so long as they carry at a reasonable rate for every shipper no one can complain if they are willing to carry for others at a less rate.

This rule finds expression in the decision of the New York Court of Appeals in *Lough v. Outerbridge*, 143 N. Y., 271-278. The court, among other things, said:

"There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation, as a business, with or without a special agreement, and for all people indifferently, and in the absence of a special agreement, he was bound to treat all alike in the sense that he was

not permitted to charge any one an *excessive* price for the services. He has no right, in any case, while engaged in this public employment, to exact from any one anything beyond what under the circumstances is *reasonable* and *just*. . . . So long as the regular standard rates maintained by the carrier and offered to all are *reasonable*, one shipper can not complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates. . . . Whatever effect may be given to the legislation referred to, in its application to railroads and other corporations deriving their powers and franchises from the State, there can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons and upon special conditions without violating any of the duties or obligations to the public inherent in the employment."

This same court quotes with approval from the opinion of Judge Wallace of the Federal Court to the effect that a common carrier is not required to treat all those who patronize him with absolute equality; that it is his privilege to charge less than a fair compensation to one person, or to a class of persons, and that others can not justly complain so long as he carries on *reasonable* terms for them; that, respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and that, except as thus restricted, he may discriminate at pleasure. It is to be borne in mind that the court was here dealing with the common law obligation of a common carrier. The same doctrine is applied generally to other public-service corporations, and there is an indirect recognition of it by our Supreme Court in the Snell case, *supra*, where the court was dealing with an electric light company.

It is thought that the current of authorities will establish, and that our own courts will hold, that this common law right to discriminate is subject to the limitation that the discrimination must not be *arbitrary* or *unjust*, but must rest upon some reasonable basis.

It remains then to determine whether competition is a

circumstance which will *warrant* discrimination, and, if not, whether it is an element to be considered *together with other circumstances* as a justification for discrimination.

The force of competition as an element in fixing rates has arisen most frequently in cases growing out of violations or alleged violations of the Interstate Commerce Act, where it has been complained that common carriers were, in some instances, charging less for a long haul than for a short haul, in violation of the long-haul and short-haul clause in that Act.

This Act, among other things, provides that all charges made for services rendered in the transportation of passengers or property shall be *reasonable* and *just*, and that every unjust and unreasonable charge for such service shall be unlawful. It prohibits charging or receiving from any person a greater or lesser compensation for service than is charged or received from any other person for doing "a like and contemporaneous service" under "substantially similar circumstances and conditions," and declares that disregard of such prohibition shall be deemed "unjust discrimination."

The Act further made it unlawful to give any undue or unreasonable preference or advantage to any person, etc., and the question which the court considered, among other things, in each case, was whether competition was an element to be considered in determining whether a condition of "substantially similar circumstances and conditions" existed, and whether an "*undue or unreasonable preference or advantage*" was given where there was a discrimination in rates.

In *Texas & Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S., 197, the court said (p. 233): "among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, *competition* that affects rates should be considered."

In *Interstate Commerce Commission v. Alabama Midland Railway Company*, 168 U. S., 144, the court, in discussing the same question, said (page 167):

"In order to further guard against any misapprehension of the scope of our decision it may be well to observe that

we do not hold that the *mere fact of competition*, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have the effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration."

Again, in *East Tennessee, etc., Ry. Co. v. Interstate Commerce Commission*, 181 U. S., 1, the court said that (p. 12): "it has been settled by this court that competition which is *controlling on traffic and rates* produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point."

And in *Interstate Commerce Commission v. Louisville, etc., R. R. Co.*, 190 U. S., 273, the court said, speaking of a ruling of the Interstate Commerce Commission (p. 284):

"But such a ruling was equivalent to overthrowing the settled construction of the Interstate Commerce Act allowing carriers to charge the lesser rate for the longer than for the shorter distance, if at the farther point the lesser rate was justified by a substantial dissimilarity of circumstances and conditions there prevailing, consequent upon *real competition*."

While these cases involve a construction of a Federal statute, the principles announced relative to the question of competition and its effect upon rates are, in my opinion, applicable to the question submitted by your Committee, and now under consideration.

Our own Supreme Court, in the case of *Chicago & Alton R. R. Co. v. The People*, 67 Ill., 11, announced a doctrine in the opinion at variance with the doctrine announced in the

cases just referred to; but an examination of the question involved in this case will disclose that the language of the court upon this question of competition was entirely unnecessary, because the question here under consideration was not there involved.

The Chicago & Alton Railroad Company had charged a rate for transporting lumber from Chicago to Lexington in excess of the rate charged for transportation of like lumber from Chicago to Bloomington, which was sixteen miles farther from Chicago than was Lexington. A statute of this State provided that in case of *any* discrimination there should be a forfeiture of the company's franchise, and a *quo warranto* proceeding was begun to forfeit the franchise for this discrimination. Section 15 of Article II of the Constitution of 1870 provides that the General Assembly shall pass laws to correct abuses and prevent *unjust* discrimination and extortion in the rates of freight and passenger tariffs on the different roads in this State and enforce such laws by adequate penalties, etc. It will be noted that what the Constitution authorizes is the enactment of laws to prevent *unjust* discrimination; thus clearly implying that *all* discriminations are not unjust, and that where not unjust discriminations may be made.

The act of the legislature involved was not to prevent *unjust* discriminations, but was aimed against *all* discrimination, and the validity of this act was the real question the court was called upon to decide. Inasmuch as the statute involved forbade *all* discriminations, there was no necessity for the court to decide or to consider the question of *what would be unjust* discrimination and what elements or circumstances might be taken into consideration in determining whether a discrimination was just or unjust, so that the statement of the court to the effect that competition was not an element to be considered in determining the justice or injustice of discrimination was purely *dictum*, and, therefore, is not authority.

Following this decision holding the statute in question unconstitutional the legislature passed an act to prevent extortion and *unjust* discrimination in the rates charged by

railroads in this State, which went into force on July 1, 1873 (Starr & Curtis' Rev. Stat., Vol. 3, p. 3309). This act, it will be noticed, relates only to railroads. It has no application to other public-service corporations. In consideration of the fact that the *dictum* contained in the Chicago & Alton Railroad Company case, *supra*, is not authority, and that the expression of opinion there contained on this question of competition is at variance with the general current of authorities, it can not be said that the law of this State is different than as indicated in the federal court cases, and I am of opinion that *real* competition is an element to be considered in determining whether a discrimination in rates is just or unjust, and where this competition is of such a character as to *materially* affect rates, it may be in and of itself a sufficient justification.

7. "Under a regulation of reasonable rates by the Council can the company be required to furnish service to any customers at a loss?"

The Commonwealth Electric Company and the Chicago Edison Company are each what is popularly known as public-service corporations. Dealing with an act of the State of Michigan regulating the fare of passengers on a railroad, the Supreme Court of the United States said:

"The legislature has power to fix rates."

Chicago & Grand Trunk Railway Co. v. Wellman, 143 U. S., 344.

"Both telegraph and telephone companies are engaged in a 'business affected with a public interest,' within the meaning of the rule laid down in a leading case, and the *state*, in the exercise of its police power, may therefore regulate the charges of such companies and provide a maximum rate which their charges shall not exceed.

"The *municipality* can not regulate the charges of telegraph or telephone companies in the absence of express legislative authority. Such a power is not embraced within the general police powers of a city."

American and English Ency. of Law, 2d Ed., Vol. 27, pp. 1019-1020.

The same doctrine applies to gas companies, water companies, electric light companies, etc.

Rogers Park Water Co. v. Fergus, 178 Ill., 571.

Same case, 180 U. S., 624.

City of Chicago v. Rogers Park Water Co., 214 Ill., 212.

Snell v. Clinton Electric Light, Heat and Power Co., 196 Ill., 626.

It may be well to here state the common law obligation of a public-service corporation such as a common carrier, gas company, water company, electric light company, etc., for the same rule applies to all of them, and this can be no better done than to borrow the language of our own Supreme Court in *Wagner v. City of Rock Island*, 146 Ill., 139. The City of Rock Island had established a waterworks system which, as the court held, it was operating in its private capacity, and the question of the validity of an ordinance regulating rates was before the court. The opinion states (p. 156) :

“It is a rule of the common law, that parties carrying on business which is public in its nature or which is impressed with a public interest can not select their patrons arbitrarily, but must serve all who apply on equal terms, and at *reasonable* rates, but this is as far as the rules of the common law seem to have gone. *They do not require absolute uniformity of rates nor forbid discrimination by performing the service for one at rates lower than those exacted of others.* The most familiar illustration of pursuits of this character is that of a common carrier, and the well recognized rule is, that while the carrier can not select his patrons arbitrarily, and must furnish equal facilities to all and on equal terms, he is not forbidden to take one customer’s goods at an unreasonably low rate or to confer on that customer other practical advantages in the transportation to which the competitors and the general public are not admitted. . . . The same rule, doubtless, where no statutory restriction has intervened, is equally applicable to all other kinds of business which have become affected with a public interest, such as that ordinarily carried on by telegraph or gas companies, the construction and maintenance of public wharves, or the maintenance and operation of waterworks in cities.”

It will be noted that the common law obligation is to serve patrons at *reasonable* rates, and it will be found from an examination of the authorities that this right in the state to regulate rates is subject to the qualification that the rates fixed by law where the power is exercised must not be unreasonable. The language of the court which I quoted from the Wellman case, to the effect that "the legislature has power to fix rates," is immediately followed by "and the extent of judicial interference is protection against *unreasonable* rates." In a word, this power in the state to regulate rates is not an arbitrary and unlimited power, but is one subject to the judicial test of reasonableness. Article V of the Amendments to the Federal Constitution provides that no person shall "be deprived of life, liberty or *property* without due process of law nor shall private property be taken for public use without just compensation"; and Article XIV of the Amendment provides that no state shall "deprive any person of life, liberty or *property* without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." Running through all of the cases where courts have considered and discussed the power of the state or of a municipality acting under authority from the state to regulate rates, and the extent to which that regulation may go is the idea clearly set forth and vigorously sustained, that such rates must be just and reasonable; that is to say, must be such as to provide reasonable compensation on the fair value of the investment. Legislatures of states and legislative departments of municipalities have not the right arbitrarily and without investigation or consideration, and regardless of the rights of the individual or corporation concerned, to fix a maximum rate or charge which will compel operation by the particular individual or corporation at a loss, while others engaged in public service may earn a reasonable compensation for the services rendered, for that is not only denying to the individual or corporation affected the equal protection of the laws guaranteed by the Federal Constitution, but it is depriving that individual or corporation of his or its property without due process of law, and it is taking private property for public use without just compensation.

Smyth v. Ames, 169 U. S., 466; 42 L. ed., 819-850.

San Diego Land and Town Co. v. National City, 174 U. S., 739, 43 L. ed., 1155.

By an act of the General Assembly of this State it was provided, subject to adoption of the act by the people, that the City of Chicago

“is hereby empowered to prescribe by ordinance maximum rates and charges for the supply of gas and electricity for power, heating and lighting furnished by any individual, company or corporation to such city and the inhabitants thereof. Such rates and charges to be *just* and *reasonable*, and may be fixed for a period not exceeding five years, and in case the corporate authorities of any such city shall fix *unjust* and *unreasonable* rates and charges the same may be reviewed and determined by the Circuit Court of the county in which said city is situated.”

Hurd, 1905, Chapter 24, par. 677.

Thus the legislature of this State (for the act has been adopted by the people) has conferred upon the City of Chicago, through its Common Council, power to regulate rates and charges of electric light companies engaged in furnishing electricity for power, heating and lighting to the inhabitants of said city, but it will be noticed that this act contains the limitation that the rates and charges shall be “just and reasonable.” In other words, this statute simply vests in the municipality the power to do what the legislature had the right to do, subject to the limitations of the common law. Having in mind now that both at common law, where fixed by act of the General Assembly and under the statute, where fixed by the Common Council of this city, rates must be just and reasonable, which means that they must be such that the individual or company concerned may under them earn a reasonable compensation upon the fair value of his or its investment, it is to be determined whether in the language of the question now being considered the individual or company can “be required to furnish service to any customers at a loss.” In other words, to state the problem differently and applying it to an electric light company, must the maximum rate, as fixed by an act of the General Assembly, or

by an ordinance of the City Council, be such that a reasonable profit may be made upon each customer supplied or is the test "just and reasonable" met by a rate which, if applied to the aggregate business, or where the business is susceptible of classification and has been classified as applied to the class in question, brings to the company reasonable compensation on the fair value of its investment, although the service of some of its patrons by reason of peculiar circumstances may be at a loss.

The problem is not easy of solution. I have been unable to find any case where this precise question has been considered and determined, and the solution of it, therefore, must be gathered from principles announced by the courts in other cases somewhat dissimilar in point of fact, but where the principles seem controlling. This question, as applied to the regulation of railroad rates, has been discussed by the courts in a number of cases.

In *St. Louis & San Francisco Railroad Company v. Gill*, 156 U. S., 667 (11 L. R. A. 452) (39 L. ed., 567), the company's road was composed of a part built by itself and the balance it had purchased from a company formed by the consolidation of three other companies. The State of Arkansas, by an act of its General Assembly, fixed a rate of three cents per mile. The company claimed that the part of the road in question could not carry passengers at three cents per mile without loss, and that for that reason it was an unreasonable rate. The act provided a severe penalty for its violation in favor of the person overcharged. The court held that the question of whether passengers could be carried for three cents per mile without loss over the portion of the road involved in the suit in question was not the test in determining whether the rate fixed was reasonable, but that the test was whether it was a reasonable rate taking the company's road within the State of Arkansas as an entirety. The following may be quoted with profit from the opinion (p. 573):

"It, therefore, appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety, even in the State of Arkansas, but were made in reference to that portion of the road originally belonging

to the St. Louis, Arkansas & Texas Railway and extending from the northern boundary of Arkansas to Fayetteville, in said State. In this state of facts we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line and not upon that part which was formerly a part of one of the consolidating roads; that the company can not claim the right to earn a net profit from every mile, section or other part into which the road might be divided, nor, attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the State of Arkansas."

Our own Supreme Court has discussed this question as applied both to a railroad company and to a street car company.

In *The People ex rel. v. The St. Louis, Alton & Terre Haute Railroad Company*, 176 Ill., 512, where a writ of mandamus was sought to compel the railroad company to run a passenger train between certain stations on a branch of its road, and it was represented that a passenger train could not be run on the branch in question, except at a loss, the court answered (p. 529):

"It is said that the earnings of the Belleville & Eldorado Railroad running from Du Quoin to Eldorado, when that road is taken by itself and considered separately, are not sufficient to justify the expense of running a separate passenger train from Du Quoin to Eldorado. But why should this branch be considered separately and by itself? Appellee operates its main road and its leased branches as one system, and as thus operated the main road and its connections or branches yield the net yearly income of about \$600,000,

already referred to. All the divisions which are entirely within the boundaries of the State of Illinois are merely feeders of the main road running from East St. Louis to Belleville, which is also in Illinois, and all the leased roads above mentioned, except that running to East Carondelet, are feeders of the road running from Belleville to Du Quoin. The latter road and the Belleville & Eldorado Railroad are required, by the charter of the Belleville & Eldorado Railroad Company, and by the terms of its lease to, or agreement with, appellee to be operated as one line, and such operation as one continuous line is merely the carrying out of the original intention of said charter, which provided for the operation of one continuous line from Belleville to Eldorado. It is no more proper to select the fifty miles from Du Quoin to Eldorado of this compact network of roads, all operated under one system and all contributing to the support of each other, as being deficient in the profits necessary to justify a reasonably safe and convenient operation of passenger traffic than it would be to select any other portion of the line running from East St. Louis to Du Quoin and charge that portion with being deficient in such profits.

“If it be admitted that a railroad company is not bound to run a separate passenger train when its business is not sufficient to warrant it in doing so, we are confronted at this point with the question, whether this doctrine refers to the business done by the main road and other roads leased by it and connected with it, all of which are operated, or are required to be operated, as one line, or whether it can be made to refer to a small part of the continuous line or system which happens to run through a section of country where the freight is not so much, and the passengers are not so many, as is the case on some other part of the line. We are of the opinion that *the whole business of the various parts operated as one line should be taken into consideration*, where the circumstances are such as are revealed by this record.”

In *Chicago Union Traction Co. v. The City of Chicago*, 199 Ill., 579, the court held that in determining a rate of fare for a street car system the earnings of the entire system must

be considered — not that of some single branch. Said the court (p. 647):

“But if, as this opinion holds, the Chicago Consolidated Traction Company is merely a part of the Chicago Union Traction Company, and owned and operated by the latter company, then it was necessary to show the profits and earnings of the *whole system of railways* embraced within the Chicago Union Traction Company, and the effect of the enforcement of the ordinance upon all the lines embraced within the whole system. Evidence of the earnings or expenses of a single mile or division of a system of railways is inadmissible to prove that a rate, fixed by legislation, is unreasonable.”

This rule is subject to the limitations applied to railroads, where rates are regulated by statute, that the earnings on the entire system must be considered as meaning the entire system within the State in question, and not as including parts of the general system outside the boundaries of such State because legislation by a State has no extra territorial force (*Smyth v. Ames*, 169 U. S., 466; 42 L. Ed., 819-847), and applying the same principle to a water company whose rates had been regulated by ordinance of a city council where the company's plant extended beyond the limits of the city and into the country, it was held that, in determining whether the rates as fixed by ordinance were reasonable, the company could not insist upon a rate within the city sufficiently high to enable it to overcome the losses incurred in the operation of the plant beyond the city limits.

San Diego Land & Town Co. v. National Water Co., *supra*.

In this connection it is not to be overlooked that our own Supreme Court, in *City of Chicago v. Rogers Park Water Co.*, 214 Ill., 212, held invalid an ordinance regulating the rates of a water company and by its terms requiring the company to supply water *free* to dwellings, flats, department buildings, etc., for sanitary purposes — a class of business from which the company theretofore had received an income of over \$5,000 per year — the ground of the opinion being that the provisions of the ordinance in question could be “regarded

as nothing more nor less than the taking of appellee's property and appropriating the same to public and private uses'' without making compensation therefor. This ordinance, however, was an attempt, by the City Council, under a statute requiring rates to be just and reasonable, to arbitrarily provide that water should be furnished for certain purposes to a certain class of buildings free. The right to regulate does not carry with it the right to confiscate, and the court properly held the ordinance invalid. From an examination of many authorities bearing more or less directly upon this question, I have reached the conclusion that the State, under its common law powers, or the City Council under authority from the State, may not, in the regulation of rates, arbitrarily and without reason, select an individual or set of individuals and provide that a public-service corporation must serve him or them free of cost or at a rate below the actual cost of the service, which differs from the former only in degree — both amounting to a taking of private property — nor can the State or municipality arbitrarily and without reason classify the business of such a public-service corporation, and require service to be furnished to any class free or below cost, but that the State or the municipality in the regulation of rates may prescribe a rate which, as applied to the entire business involved, will be just and reasonable, bringing to the company reasonable compensation upon the fair value of its investment, or, where the business in question is of such a character that its patrons may, upon reasonable grounds, be classified, such a classification may be made in the regulation of rates, provided that such rates upon each class be just and reasonable, etc., and that it will be no valid objection to such rates that there may be some patrons of the company so circumstanced that such service at the rates fixed must be at a loss. What percentage of patrons, or what proportion of a company's business, a company may be required to serve at a loss under rates which will be sustained by the courts can not, in my opinion, be determined in the present state of the authorities.

The right to classify a business in the regulation of rates finds support in *San Diego Land & Town Co. v. National*

City, supra, which involved the rates of a water company; *Wagner v. The City of Rock Island*, 146 Ill., 139, also involving the rates of a water company, and in *Minneapolis & St. Louis Railroad Company v. Minnesota ex rel. Railroad and Warehouse Commission*, 186 U. S., 257, 46 L. Ed., 1151.

In the Minneapolis case a rate was fixed by the railroad and warehouse commission in that State on hard coal per carload, and it was claimed that, if that rate were fixed on all freight, it would not pay operating expenses; but the court held that was not the test, that the commission might reduce freight rates on particular articles if there was still a fair profit on the entire business.

I have already suggested that such a classification can not be purely an arbitrary one, but that it must rest upon some reasonable ground. Whether or not such a classification can be made must depend upon the nature and character of the particular business in question.

It will be noted that throughout this discussion I have spoken of rates being fair and reasonable, which will produce a reasonable compensation upon the "fair value of the investment." It is not required that rates produce reasonable compensation upon a total investment. Many elements may enter into the amount of an investment to increase it beyond its present fair value. For instance, there may have been gross extravagance in the construction of a plant, grossly extravagant salaries may be paid in the operation of a plant, and these are elements to be taken into consideration, for, while the public-service corporation has its rights under the law, which courts must safeguard and protect, the public also have their rights which courts must equally safeguard and protect. While the company furnishing the service is entitled to exact from the public such a rate of compensation as will bring reasonable returns upon the fair value of the investment involved, and the public must expect to pay such compensation, on the other hand the public have a right to service at rates which are fair and reasonable, and a rate is not reasonable to the public which must be made high enough to pay a profit upon an investment in excess of the fair value of the plant.

Smýth v. Ames, supra.

San Diego Land & Town Co. v. National City, supra.

The regulation of rates is a *legislative* and not a *judicial* problem. (*Madison v. Madison Gas & Electric Co.*, 8 L. R. A., N. S., 529, 108 N. W., 65.) Courts may declare a rate unreasonable and restrain its enforcement, but it is not the function of courts to establish a rate and put it in force. In this connection it may be of value to the Committee for me to note an additional limitation recognized by the courts in passing upon the validity of statutes and ordinances regulating rates. A rate fixed by either statute or ordinance is in itself presumptive evidence of its reasonableness, and the burden of showing the rate to be so unreasonable as to amount to a violation of the legal rights of the company involved rests upon the party making the attack.

Cotting v. Godard, 46 L. Ed., 92 (183 U. S., 79).

Union Traction Co. v. City of Chicago, supra, p. 642.

Nor will courts interfere to declare a statute or an ordinance invalid because of the unreasonableness of a rate prescribed

“unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.”

San Diego Land & Town Co. v. National City, supra.

8. “Is a period of fifty years in such grant as in the Commonwealth Electric Company ordinance an unreasonable length of grant, and thus would it make the grant illegal or void? If so, what would be the effect of the passage of such an ordinance as that passed on June 11, 1906?”

The Legislature has the power to fix a maximum limitation upon the period of time for which a municipality may grant the right to a public-service corporation to use public streets, alleys, etc., and where such limitation has been fixed the municipality may not make a grant for a period beyond the limitation.

In what is known as the Horse and Dummy Act (Rev. Stat., Ch. 131a), which applies to street railways, a limita-

tion of twenty years has been provided, and by the terms of Section 1, Article X, Chapter 24 of the Revised Statutes (Hurd's Stat. 1905, p. 312), which relates to the granting of rights to a water company by a municipality, a limitation of thirty years has been provided.

I know of no other statutory provisions in this State limiting the right of a municipality in this regard, and these apply only to horse and dummy railways, which includes street railway and water companies.

The public policy of a State is established, not by its courts, but by its legislation. It will be noted that there are but two statutory provisions, and there is a difference of ten years in the time allowed between them. It can not be said, therefore, that there is any established public policy in this State which would have the effect of placing a limitation upon municipalities in the regard here under consideration. Nor am I able to find any authorities which will justify the position that a period of fifty years is so unreasonable as to be void. It is my opinion that where, as under the law of this State, the right to regulate and control these public-service corporations, including the right to provide the maximum rates which they may charge for service, remains, a grant for a period of fifty years is valid.

This view renders it unnecessary to notice the second portion of the question now under consideration.

Yours very truly,

GEORGE W. MILLER,

First Assistant Corporation Counsel.

NOVEMBER 5, 1907.

FRANK I. BENNETT, Esq., Chairman, Committee on Finance.

Dear Sir:

We return herewith papers in the claim of William E. McCarthy for extras on contract at the Chicago avenue pumping station which you transmitted with the request that the Committee be advised as to the city's liability.

It seems from these papers that Mr. McCarthy entered into a contract with the city in June, 1906, for the construction of foundations for the pumping engine at the Chicago avenue

pumping station; that in the progress of the work the engineer deemed it necessary to have certain work done that was not provided for in the contract; that Mr. McCarthy did this extra work, for which he makes a charge of \$468.00 and that he also makes a charge of \$450.00 for the delay of nine days in the prosecution of his work, his contract providing that he should be paid a bonus of \$50.00 for each day that the work was finished before the time in the contract. The third item in his claim is for \$82.50 for 110 loads of clay delivered at the request of the engineer, but it seems that the council order passed May 13, 1907, has already authorized the payment for this particular item.

As to the first and second items, we have to say that the city is not liable. Section 1845 of the Revised Municipal Code of 1905 expressly provides that no extra work shall be paid for "unless the express authority of the City Council be first procured and for the expenditure of the amount to be paid therefor."

The courts have held uniformly that, whenever an ordinance provides the method of ordering extra material or labor and the manner of making payments therefor, the city is not liable for any extras furnished unless the manner prescribed by ordinance is followed strictly.

McDonnell v. New York, 68 N. Y., 23.

Welston v. Morgan, 65 Ohio State, 219.

School Directors v. Fogelman, 76 Ill., 186.

Pope v. Alton, 214 Ill., 102.

Yours very truly,

WM. D. BARGE,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

NOVEMBER 19, 1907.

T. W. BROWN, ESQ.

Dear Sir:

Your letter of November 18, 1907, addressed to the Corporation Counsel, in which you ask to be advised as to what

position the City of Chicago is taking with reference to the matter of the return of the six dollars paid to the Clerk of the Municipal Court in cases where a demand for trial by jury is made and where no jury trial is in fact had, has been referred to me.

Section 56 of the Municipal Court Act, as amended, provides that when a party "files with the Clerk a demand in writing for a trial by jury, he shall pay to the Clerk a further sum of Six Dollars (\$6.00)." As the Municipal Court Act was originally passed, there was added these words, "to be applied toward the payment of the fees of jurors in said court." These latter words were stricken out of the section by the last Legislature. There is no provision in the Act which provides for a return of the six dollars in case a trial by jury is not actually had.

Section 30 of the Municipal Court Act, as amended, provides that certain cases therein specified shall be tried by the court without a jury, "unless the plaintiff at the time he commences his suit, or the defendant, at the time he enters his appearance, shall file with the Clerk a demand in writing of a trial by jury, *which demand, however, may be withdrawn by the party filing the same at any time before the trial.*"

While it appears, therefore, that a demand for a jury trial may be withdrawn, there is no provision to the effect that the fee, which must be paid when the demand is made, shall be returned at the time of such withdrawal; and in my opinion it does not follow that because the demand for a jury trial may be withdrawn, the fee is to be returned. The six dollars, which the Act provides must be paid at the time the demand is made, is treated by the Act as it now stands in precisely the same way as the other items of costs. There is no provision that this six dollars shall be applied toward the payment of the fees of jurors or in any other specified way. The money paid becomes a part of the general income of the Municipal Court. Having once been paid to the Clerk it is held by him in the same way as other costs paid to him and as a part of the same fund, all of which he must pay over to the City of Chicago.

Again: There is nothing in the Act which seems either directly or by implication to treat the six dollars paid as a

deposit. If the Act stated that the six dollars simply should be "deposited" with the Clerk there might be ground for claiming its return in case the jury trial is not actually had; but the money must be *paid*, and the Clerk has no authority, in my opinion, to return it in cases where the demand for a trial by jury is withdrawn or where the case is dismissed before trial is actually had.

When a demand for a jury trial is made and the fee paid, the party who has paid the fee is entitled, as a matter of right, to a jury trial, and the city must stand ready to furnish the jurors for such trial. All the preliminary steps for summoning jurors and securing their attendance must be taken by the city in order that it may stand ready to furnish jurors when needed. If the litigant changes his mind or dismisses his suit, he ought not, it would seem, to be heard to complain because he can not back the fee paid when the city has gone to the trouble and expense of preparing to furnish the jury which he has demanded. The city all the time has stood ready to furnish him exactly what he asked for — a jury trial.

I have been able to find no Illinois case which can be considered an authority on the question here discussed. It has been held under the general provisions of the Statutes of 1844, which provide "that a jury fee of \$3.00 shall be taxed with the costs of each suit, which . . . shall be collected by the clerk of the court, and paid into the county treasury, there to remain and be held as a special fund for the payment of jurors," that a jury fee is taxable only in such cases as are tried by a jury.

Hoard v. Bulkley, 3 Gilm., 154.

This, however, was under general statute providing for a jury fee in all law cases, and the court merely held that the fee was not taxable until the case had progressed to such a point that the jury was actually impaneled. The case is not at all parallel or even analogous to the case of the costs for jury trial paid to the Clerk of the Municipal Court when a demand for such trial is made.

The question which you raise has been raised by others who have made a similar demand upon the Clerk of the Municipal Court for the return of the jury fee, and while in

my opinion there is no ground upon which the Clerk would be justified in returning the fee, this department is not adverse to having the question tested; in fact, if any members of the bar, after a careful investigation of the question, believe that the position of the Clerk of the Municipal Court and of the City of Chicago in this matter is wrong, the city will welcome such a test.

Yours very truly,

EDWIN H. CASSELS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

NOVEMBER 21, 1907.

JOSEPH F. KOHOUT, Esq., Alderman, Thirty-fourth Ward.

Dear Sir:

In compliance with your verbal request, I have gone over the draft of proposed ordinance submitted by you designed to suppress fortune telling, palmistry and like practices and to prohibit the advertising thereof, and after making a slight revision in the wording return same herewith.

The object you seek to accomplish through the enactment of this ordinance raises a new and novel question so far as the judicial determination of the rights of persons affected thereby is concerned.

I have made an exhaustive search of American decisions and have only been able to find one reported case which is at all in point, viz.: the case of *State v. Kenilworth*, 54 Atl. Rep., 244, decided by the Supreme Court of New Jersey in 1903, wherein the defendant was convicted of a violation of a statute concerning disorderly persons under a provision thereof declaring:

“All persons who shall use or pretend to use, or have skill in physiognomy, palmistry or like crafty science, shall be deemed and adjudged disorderly persons.”

The court upon *certiorari* sustained the conviction in the following language:

“Undoubtedly within the intent of this statute palmistry is ‘a craft science’—that is, one by which the simple minded are apt to be deceived. So much is plainly indicated by the collocation of the words ‘palmistry or like craft science’; it was so used by the prosecutor (defendant) when from the lines on the palm of the complaining witness he foretold the age at which the witness would marry and the duration of his life. If ever there should be discovered any rational evidence that palmistry is a real science, its use for honest purposes will pass beyond the range of this statute; but in the present case the use of palmistry was plainly within the prohibition. We find no reason for denying the validity of the act.”

As regards the validity of the ordinance, the first consideration is as to whether the City Council has the power to enact the ordinance in question. If the Council possesses such power, it derives it from that portion of Clause 45 of the Cities and Villages Act reading:

“To suppress gaming and gambling houses, lotteries and *all fraudulent devices and practices for the purpose of obtaining money or property.*”

together with the power conferred under Clause 66 of the same Act reading:

“To regulate the police of the city and to pass and enforce all necessary police ordinances.”

The powers conferred by this latter clause have been passed upon by our Supreme Court on numerous occasions, and it has been held that the power granted herein “is not limited to the regulation of a police force, but embraces the subject matter of police regulation under the general police power of the State.” (*McPherson v. Village of Chebansee*, 114 Ill., 46.)

“The police power is that inherent or plenary power which justifies the prohibition of all things hurtful to the comfort, safety and welfare of society, and may be termed ‘the law of overruling necessity.’ ”

Town of Lake View v. Rosehill Cemetery Co., 70 Ill., 191.

“Anything which is hurtful to the public interest is

subject to the police power and may be restrained or prohibited in the exercise of that power."

Dunne v. People, 94 Ill., 120.

The above, quoted with approval in *City of Chicago v. Gunning System*, 214 Ill., 628.

"How far the provisions of the Legislature can extend, is always submitted to its discretion, *provided its acts do not go beyond the great principle of securing the public safety*, and its duty to provide for the public safety within well defined limits and with discretion is imperative. All laws for the protection of lives, limbs, health and quiet of the person, and for the security of all property within the State, fall within this general power of government."

State v. Noyes, 47 Me., 189.

Tiedeman on Limitations of Police Power, p. 3.

"An ordinance may derive its validity from several different grants of power, and does not depend solely upon any single section or clause of the statute." (*Gundling v. City of Chicago*, 176 Ill., 340; *Kinsley v. City of Chicago*, 124 Ill., 359.)

Another consideration is, whether the power of prohibition under the police power extends to the class or classes of business covered by this ordinance. Upon this point, Freund, in his work on Police Power, Section 59, states the principle to be:

"The correct constitutional principle seems to be that a business serving valuable, economic or social purposes, may not be entirely prohibited because it is attended with danger or liable to abuse, but that the policy of prohibition may be sustained if the business exists only for the gratification of pleasure or has otherwise no legitimate function."

Citing in support of his text the case of *State v. Kenilworth*, above referred to.

I have found the following criminal cases, wherein the representation of the possession of supernatural power was held to be a representation of an existing fact, and convictions for obtaining money by false pretenses based thereon

were sustained: (*Regg v. Giles, Leigh*, etc., 10 Cox' Criminal Rep., 44; *Commonwealth v. County Prison*, 15 Weekly Notes of Cases (Pa.), 282; American & English Ency. of Law, 2d Ed., Vol. 12, p. 845, note.)

The Criminal Code of our State (Section 100, Chap. 38, Revised Statutes), prohibits pretensions to fortune telling in certain of its forms, viz.:

“SWINDLING BY CARDS, SLEIGHT OF HAND, etc. Whoever, by the game of ‘three card monte,’ so-called, or any other game, device, sleight of hand, pretensions to fortune telling, trick or other means whatever, by use of cards, or other implements or instruments, fraudulently obtains from another person property of any description, shall be punished as in case of larceny of property of like value.”

This statute has been construed by our Supreme Court in the case of *Blemer v. The People*, 76 Ill., 265, wherein it was held:

“That the words ‘game,’ ‘device,’ etc., here allude directly to and are qualified by the words ‘use of cards,’ and that they are intended to describe in different words the same thing. The gist of the offense is, the obtaining of property by the fraudulent use of cards, the details by which this is effected being unimportant.”

With regard to the first consideration, as to the power of the Council to enact the ordinance in question, I am of opinion that the provisions thereof come within the power conferred by Clause 45 and Clause 66, above set forth, basing my opinion upon the ground that it has been repeatedly demonstrated that the practices sought to be prohibited are peculiarly susceptible of fraud and imposition upon the public generally and upon the simple minded element thereof in particular.

As to the second consideration above referred to, regarding the nature of the business sought to be suppressed, I can not conceive how it can be successfully contended that such practices, occupations or callings exist for any useful purpose,

or that they have any legitimate function, or that they are of any benefit or advantage to the public.

The first section of the ordinance prohibits advertising of fortune telling in any form. I consider this section valid upon the ground that if the exercise of the practices themselves can be legally prohibited, as it is contended they can be, then any inducement employed to attract patrons or customers to such illegal business can, of necessity, also be prohibited.

The second section comes particularly under the grant of power contained in Clause 45, and I have changed the wording of your draft to conform with that of the section itself; you will note, under this clause it is essential that the exercise of the "fraudulent devices and practices" must be for the purpose "of gaining or obtaining money or property." It is to cover this point that I have changed the wording of your draft.

The third section, upon first reading, appears to infringe upon the constitutional guarantee of religious liberty, but upon closer reading I do not believe it is open to this objection, as it does not in any manner interfere with the exercise by any person or persons of his or their religious belief, but merely prohibits, under penalty, the practice of fraud or deception therein either for or without valuable consideration. I, therefore, consider this is a valid enactment in the exercise of the police power.

Our Supreme Court, in passing upon the capacity of persons to make testamentary disposition of their property, has recognized the existence of spiritualism as a religious belief, in the following cases:

Whipple ex rel. v. Eddy, 161 Ill., 114.

Orchardson v. Cofield, 171 Ill., 14.

Owen v. Crumbaugh, 228 Ill., 380. (Adv. sheets, part 2.)

Inasmuch as, as above stated, I do not consider that your ordinance in any manner interferes with the exercise by any person of his religious belief or creed, including his belief in spiritualism, I do not believe that the foregoing rulings of the Supreme Court, dealing as they did with an entirely different

phase of the question, would have any bearing upon the validity of your proposed ordinance.

Yours very truly,

OSCAR A. OLSEN,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

NOVEMBER 27, 1907.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

Your favor of the 14th inst., enclosing a communication from Mr. J. M. Warner, General Superintendent of the Chicago & Western Indiana Railroad Company, together with a blue-print showing the location of certain tracks near Western avenue and Seventy-fifth street, has been transmitted to me for attention, and I note that you desire to be advised as to whether or not your department should grant a permit to this railroad company to lay one additional track across Western avenue.

The Chicago & Western Indiana Railroad Company, by virtue of an ordinance passed by the trustees of the Town of Lake on July 5, 1881, were granted permission and authority to lay down, maintain and forever operate with steam power, two or more tracks on or along a route wherever indicated, with such switches, sidings, turnouts, with track connections with any railroad now or hereafter constructed, and also with any manufacturing and other establishment, lumber or coal yards on or near the said route as may be necessary.

Doubtless the section of the ordinance above referred to expresses the reason for laying the track in question, and it is true that this section grants broad powers which apparently may be exercised at any time within the discretion of the railroad company.

We are nevertheless of the opinion that, in the light of many judicial decisions controlling such questions, your department is not justified at this time in issuing the desired permit.

The authority seems to be clear that it is incumbent on a railroad company receiving from a municipality a franchise similar to the one involved in this matter to exercise the privileges granted within a reasonable time.

In the case of *R. R. Co. v. Woodruff*, 86 Ga., 94, a railroad company was authorized to connect its railroad with "such sidetracks, turnouts and sheds as may be necessary for the convenience of freight and passengers," yet the court held that it was plain that sidetracks, etc., which did not become necessary for the convenience of freight and passengers until twenty or thirty years thereafter could not have been in legislative contemplation when the act was passed. "Much safer and more rational construction is that the powers conferred by the act are exhausted by their exercise and by the consequent connection of the railroads."

City of Chicago et al. v. Chicago Terminal Transfer R. R. Co., 121 Ill. App., 211, approves the case above cited in a matter involving the same question, and says, in its opinion: "The City Council gave, by its ordinance, permission to make crossings on a given route with 'one or more railroad tracks.' When the company chose to make them with 'one' and not 'more' that particular permission may reasonably be said to have been exhausted." This decision was subsequently affirmed by the Supreme Court.

Other authorities, which we need not cite, have borne out the same rule, and we are disposed to advise your department that the Chicago & Western Indiana Railroad Company, having made its election as to what switch tracks it should lay during the first few years of the life of its franchise, is now, in law, precluded from making any further election, since twenty-six years can not be said to be a reasonable time within which the company is obliged to carry out this particular section of its ordinance.

Yours very truly,

HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

DECEMBER 2, 1907.

ARTHUR D. WHEELER, ESQ., Chicago Telephone Company.

Dear Sir:

Your communication of November 19 last, addressed to the Corporation Counsel, has been referred to me.

You ask for a construction by this Department of the last paragraph of Section 4 of the ordinance passed on November 6, last.

This paragraph reads as follows:

"The company is hereby expressly forbidden to directly or indirectly give, offer, or offer to give, promise to give, or agree to give, to any municipal or public officer or employees any free or gratuitous service or discrimination within said City of Chicago; but this prohibition shall not extend to the furnishing of free telephone service, or telephone service at reduced rates as hereinabove provided."

The words "as hereinabove provided" have reference to earlier paragraphs of the section in question, relating to service to be furnished the City of Chicago, Board of Education, etc.

Your letter inquires whether it is the view of this Department that this paragraph was intended only to apply to officers and employees of the City of Chicago, inasmuch as this is an ordinance passed by the City Council of this city, or, whether it was intended to apply generally to every officer or employee coming within the meaning of the words "public officer or employee" as ordinarily understood. In other words, you ask for a construction of the words "municipal or public officer or employee."

In the construction of an ordinance, statute or constitutional provision words are to be given their ordinary meaning, unless it is apparent from the context of the instrument being construed that they were intended to be used in another sense.

Adopting the language of our Supreme Court:

"Where the words used are clear and unambiguous they must be taken in their ordinary, natural and commonly

received sense." (I. C. R. R. Co. v. City of Chicago, 173 Ill., 471-482),

and said the court in this same case:

"Indeed, where the language of the statute is plain and unambiguous there is no room for construction, and the words used must have their natural meaning, unless some absurd or injurious consequence will result which was not foreseen by the Legislature."

Blackstone (2 Blackstone Com., Cooley's Ed., 36) defines the word "office" as:

"A right to exercise a public or private employment and to take the fees and emoluments thereunto belonging."

Chancellor Kent describes the word as "A right and correspondent duty to execute a public or private trust and to take the emoluments belonging to it." 3 Kent's Comm. (12 Ed.), 454.

Chief Justice Marshall, in U. S. v. Maurice, 2 Brockenbrough, 98, said, "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer."

In 23 American & English Encyclopedia of Law (2d Ed.), 322, it is said that "a public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of the sovereign power, whether great or small. A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law."

See also Ptacek v. The People, 94 Ill. App., 571-577, affirmed in 194 Ill., 125.

Webster defines the word "municipal" as "of or pertaining to a city or corporation having the right of administering local government," and in the Century it is defined as "of or pertaining to the local selfgovernment or corporate government of a city or town."

All municipal officers or employees are public officers or employees; but all public officers or employees are not municipal officers or employees.

If it had been intended by the City Council to limit the paragraph in question to officers or employees of the municipality alone, there would have been no occasion for the use of the words "or public." It would have been sufficient to use the words "municipal officers or employees."

It may be argued that a municipal government, in making a grant such as is contained in the ordinance in question, can only be interested in applying a provision of the kind now under consideration to its own officers and employees; but that does not necessarily follow, for a municipal government may be and should be concerned about a healthy public service generally, and may, and should be, interested in keeping all those who are engaged in the public service generally, either as officers or employees, free from that insidious form of influence which may result from the too common practice of supplying them with service without cost.

But whatever may be said of this, the municipality, in making a grant of rights and privileges to use public streets, alleys and places, may attach thereto such reasonable restrictions as it sees fit; and a grant with such restrictions attached thereto must be accepted subject to the restrictions imposed or not at all, and, in addition to this, the city, under the compensation section of the ordinance has a direct pecuniary interest in the company's receipts.

I am of the opinion that it was not intended that the paragraph here in question should be limited in its scope to officers and employees of the municipal government of Chicago, but that it was intended to apply to all those who come within the meaning of the terms "public officers or employees" as those terms are ordinarily understood.

It will not be necessary to here mark the distinction between an officer and an employee, for the ordinance is so drawn that it applies to both..

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

DECEMBER 2, 1907.

HON. FRED A. BUSSE, Mayor.

Dear Sir:

The letter of Rev. Edwin J. Randall, president of the Garfield Park Protective Association, dated November 5, which has been referred by you to this office for consideration, involves a construction of that part of Section 4 of the original dramshop ordinance of the former Town of Cicero which reads as follows:

"The license shall state the time for which it is granted, which shall not extend beyond the first day of July next following." (See Rev. Mun. Code, p. 737.)

As we understand it, the question has arisen whether the above provision is to be strictly and literally enforced within that portion of Cicero which has been annexed to the city, or whether the general city ordinance of March 5, 1906, fixing the saloon license year as the period from May 1 to April 30 next following, shall apply in this as well as in other parts of the city.

It must be borne in mind that Section 18 of the Annexation Act of 1889, Hurd's Rev. Stat., 1905, Chap. 24, Sec. 228, has been held to continue in effect all the liquor ordinances of annexed towns.

People v. Cregier, 138 Ill., 401.

People v. Harrison, 191 Ill., 257.

So that the real question to be determined is whether the old Cicero ordinance is deprived of any of its force and effect by the operation of the general city ordinance as noted above.

In determining the force and effect of the above ordinance of the Town of Cicero we are permitted to employ the following well established rules for the construction of statutes and ordinances. In *Village of Iuka v. Schlosser*, 97 Ill. App., 222, it is said at p. 229:

"In the construction of a statute, courts are not confined to the words used, but may regard the purpose, and when necessary to give effect to the meaning of the law words may be rejected and others substituted." Citing *Perry Co. v. Jefferson*, 94 Ill., 214; *Anderson v. C. B. & Q. R. R. Co.*, 117 Ill., 26; *P. & P. U. Ry. Co. v. People*, 144 Ill., 470.

And in *People ex rel Keeney v. City of Chicago*, 152 Ill., 546, the court says, p. 551:

“The several provisions of the statute should be construed together in the light of the general objects and purposes of the enactment, and so as to give effect to the *main intent*, although particular provisions are thus construed not according to their literal meaning. (*Hill v. Harding*, 93 Ill., 77; *W. St. L. & P. Ry. Co. v. Binkert*, 106 id., 298.) *The intention is to be gathered from the necessity or reason of the enactment*, and the meaning of words enlarged or restricted according to the true intent. (*Castner v. Walrod*, 83 Ill., 177; *Cruse v. Aden*, 127 id., 23.) . . . *A thing within the intention is regarded as within the statute though not within the letter*, and a thing within the letter is not within the statute unless within the intention. (*Perry Co. v. Jefferson Co.*, 94 Ill., 214; *People v. Hoffman*, 97 id., 234; *Anderson v. C. B. & Q. R. R. Co.*, 117 id., 26).”

It is submitted that the sole necessity or reason for the adoption of the ordinance in question lay in the desire of the town trustees, representing the people of Cicero, that their ordinance should conform to the State Dramshop Act and not authorize the granting of saloon licenses for a length of time in excess of one year. Similar provisions are found in the liquor ordinances of Hyde Park and of the Town of Lake, the latter providing that “all licenses shall expire on the thirty-first day of March next thereafter.” The main intention of the trustees, therefore, was to limit the duration of saloon licenses to one year. The language used, providing that a license “shall not extend beyond the first day of July next following,” is merely the form of enactment used to carry out that intention. The date set for expiration of licenses was undoubtedly fixed as July 1 purely for purposes of municipal convenience and might have been May 1 or any other date without in the least impairing or changing the real force and effect of the ordinance.

Now that part of Cicero has been annexed to the city, there is no longer a town organization in that district, and the duties of the town officers have vested in the city and county governments. Any reason of convenience, therefore, which

may once have prompted the selection of July 1 as the date for expiration and renewal of saloon licenses no longer exists.

For the foregoing reasons it must be concluded that the provision in the Cicero ordinance fixing the exact date for the expiration of licenses is not essential to the object of the enactment, that it simply indicates a mode of official procedure, and that it is merely directory and not mandatory. As is said in Sutherland on Statutory Construction, 1st ed., Sec. 447:

“Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute.”

And in *Standard v. Village of Industry*, 55 Ill. App., 523, it is said at page 526:

“The requirement in question we regard a mere direction given with a view to secure orderly and prompt conduct of the public business of municipalities, and intended merely for the guidance and government of the authorities upon whom the duty is imposed. Such requirements are directory only.” And provisions in a statute specifying the time within which a public officer is to perform an official act have been held to be directory only in *Whalin v. City of Macomb*, 76 Ill., 49, and in *Wheeler v. City of Chicago*, 24 Ill., 105.

The city may, therefore, issue saloon licenses in the annexed part of the former town of Cicero for the periods extending from May 1 to October 31, and from November 1 to April 30, without depriving the Cicero dramshop ordinance of its full force and effect.

Yours very truly,

WM. K. OTIS,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

DECEMBER 4, 1907.

W. A. EVANS, M. D., Commissioner of Health, Chicago.

Dear Sir:

Replying to your request of November 25 for a statement of what your department is required to do in the way of registration of births and deaths, I beg to state that as to births, the statute of the State does not require the Health Department or the Commissioner of Health to do anything in the way of reports or registration of births, unless the Commissioner requests reports of births to be made to him by physicians or midwives instead of to the County Clerk. (Chapter 126A, Hurd's Revised Statutes, 1905, Sec. 19.)

If the Commissioner requests that reports of births be made to him, under the statute, he is required only to deliver such reports received by him during the month to the County Clerk on or before the 10th day of the following month. (Ibid, Sec. 21.)

Section 1053 of the Revised Municipal Code of 1905 makes it the duty of physicians and midwives to report all births to the Department of Health within thirty days from the date of such birth, upon blanks furnished by the Health Department.

This section of the code very probably could not be enforced in the absence of a request by the Commissioner of Health that reports of births be made to him instead of to the County Clerk.

Section 1031 of the Revised Municipal Code of 1905 makes it the duty of the Commissioner of Health to provide the necessary books for keeping a record of all transactions of the Department, including the proper registration of births and deaths, and to also keep on hand the necessary blanks to be used by physicians and midwives and to furnish the same upon application.

As to deaths, the statute of the State provides that in cities where an ordinance requires a removal or burial permit, and that before such permit shall be issued, a report of death shall be made to the official by whom the permit shall be issued, no report need be made by the physician to the State

Board of Health. (Chapter 126A, Hurd's Rev. Stat., 1905, Sec. 22.)

The statute also provides that the reports of death to the city official shall be made in the manner directed by the State Board of Health, and upon blanks prescribed by the State Board. (Ibid., Sec. 24.)

The statute further provides that it shall be the duty of the Commissioner of Health, or other official by whom burial or removal permits are issued, to deliver to the State Board of Health all reports of death received by him during the month on or before the 10th day of the following month.

Section 1054 of the Revised Municipal Code of 1905 provides that physicians shall make a written report of death within twenty-four hours after such death to the Health Department, upon blank forms to be furnished by the Department.

Section 1055 of the same code provides that it shall be unlawful for any person to remove or dispose of a dead human body without first obtaining a permit so to do from some officer of the Health Department.

It will be noticed that:

(1) The ordinance requires reports of death to the Health Department and the issuing of burial permits by the Department.

(2) The statute requires all reports or certificates of death to be made in the manner and upon forms prescribed by the State Board of Health.

(3) The statute requires the Commissioner of Health, or other health official, to deliver to the State Board of Health all reports of death received by him.

In my opinion, where reports of death are received by the Health Department, upon which burial or removal permits are issued by the Department, such reports *must be delivered* to the State Board of Health in compliance with the statute above referred to.

Yours very truly,

EMIL C. WETTEN,
Assistant Corporation Counsel.

DECEMBER 4, 1907.

ARTHUR D. WHEELER, ESQ., Chicago Telephone Company.

Dear Sir:

This department is in receipt of your communication of November 19, last, in which you request a construction by this department of the first paragraph of Section 6 of the ordinance passed by the City Council on November 6, 1907, granting privileges to your company and regulating rates and service, etc., in this city.

We have also your communication of November 26, last, relating to the same matter.

The paragraph in question reads as follows:

"Said Chicago Telephone Company, during the term of this ordinance, shall furnish, upon demand, telephone service of any of the classes or kinds mentioned in this section in the City of Chicago *without discrimination at the same rates* to all persons, firms, and corporations who shall elect to take or use any of such classes or kinds of service and shall not charge its present or future lessees, subscribers, or patrons within the City of Chicago, rates for telephone service under yearly contracts payable monthly in excess of the following maximum rates:"

After which follows a classification of the service furnished with a statement of maximum rates for each class.

The point of your inquiry is whether, under this paragraph, all patrons receiving service of the same class as the services classified by Section 6 must be treated with impartiality as to the rates charged and the service furnished, or whether there are any conditions under which special arrangements may be made with certain subscribers, or classes of subscribers, either as to rates or as to the character of the service furnished.

At the outset, it is to be noted that we are not now dealing with the common-law right of a public service corporation to discriminate either in rates or in service furnished. There are two ways by which a municipality may regulate the rates charged and service furnished by a telephone company. One is by a police ordinance, where authority has been vested in the municipality to pass such an ordinance by the Legis-

lature of the State, and the other is by a contract ordinance, where the municipality passes an ordinance granting to the company certain rights and privileges, and by the terms of the ordinance regulates charges and service. Such an ordinance, when accepted, becomes a contract and must be carried out according to its terms.

Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill., 324-347.

The ordinance of November 6, last, having been accepted by your company, is a contract and, therefore, the right of your company to discriminate is to be determined by the terms of the ordinance itself. In an opinion, under date of the 2d inst., construing the last paragraph of Section 4 of this ordinance, I called attention to a fundamental rule as applied to the construction of ordinances and statutes, to the effect that where words used are clear and unambiguous they must be taken in their ordinary, natural and commonly received sense (*I. C. R. R. Co. v. City of Chicago*, 173 Ill., 471-482). That rule is equally applicable here.

The word "discriminate" is defined by Webster as "to make a difference or distinction, to treat unequally; to impose unequal tariffs for substantially the same service."

The word is defined in the Century as "to make a distinction in regard to; to make a difference or distinction."

In 14 Cyc., 385, the definition is "the act of treating differently," and Bouvier (Law Dictionary), speaking of discrimination as applied to railroads, says it "may also be practiced by inequality in the *facilities* afforded to different consignors."

An examination of this ordinance discloses that it was so drawn as to regulate the service to be furnished, as well as the rates to be charged. By the terms of Section 5 the company is required, without extra charge, to at all times maintain its plant "at the highest practical efficiency" and to "promptly adopt and put into use" all available improved apparatus, etc., and to so operate its plant as to give to its lessees, subscribers and patrons "the best possible service under then existing conditions of the art of telephony."

The classification of service made for the purpose of

regulating rates, and the maximum rates which the company may charge, are prescribed in Section 6.

There may be discrimination in the character of service furnished, as well as in the rate charged. If the words "at the same rate" had been omitted from the first paragraph of Section 6, the words "without discrimination," using the word "discrimination" in its "ordinary, natural and commonly received sense," especially in view of the fact that this ordinance regulates both rates and service, would be broad enough to prohibit discrimination in either rates or service, but when it is noted that, in addition to the words "without discrimination," the Council used the words "at the same rate" it becomes perfectly manifest that it was the intention of the Council to prohibit discrimination between the lessees, subscribers or patrons of the same class, both as to rates and as to the character of service furnished; in other words, to put all lessees, subscribers or patrons of the same class on an equal footing.

By your letter of the 26th of November you inquire whether the practice, heretofore followed by your company, of making special rates to charitable or church institutions, clergymen, subscribers where philanthropic features enter into consideration, as, for instance, The Citizen's Association, Municipal or Legislative Voters' League, Young Men's Christian Association, etc., may be continued without violating the terms of the ordinance, and whether or not it would alter the fact if contracts were made with such subscribers for the rates prescribed and then a rebate should be made covering a contribution or donation, the amount of which to be ascertained by some definite relation to the rate charged.

In *Cleveland, Columbus, Cincinnati & Indianapolis Railway Company v. Closser*, 9 L. R. A., 754, the Supreme Court of Indiana, speaking of a rebate, said:

"It is, in contemplation of law, nothing more than an agreement to carry the grain at the compensation ultimately agreed upon, inasmuch as the provision binding the carrier to pay back part of the nominal compensation simply fixes the amount of the actual and final compensation, although it does provide for a peculiar mode of payment."

The thing this ordinance is intended to prohibit is the substance rather than the form. A thing which can not be directly done should not be indirectly done, and in principle, so far as the test of discrimination is concerned, there can be no difference between furnishing service at a stipulated price in the first instance and furnishing it at a higher price and thereafter rebating a sufficient amount to reduce the actual cost of the subscriber to the amount really intended for him to pay.

Whatever may be said in favor of charitable institutions, churches, clergymen, citizens' associations, municipal or legislative voter's leagues, young men's christian associations, etc., it is plain that, under the language of this ordinance, you have no right to favor them as against other lessees, subscribers or patrons using service of the same class, in either rates charged or facilities furnished.

In your letter of November 19th you refer to public telephone stations in hotels, restaurants, drug stores, depots, etc., and ask whether your company has the right to classify service of this kind and to make contracts open to all members of a class, but not open to other subscribers or at other locations, etc.

If telephones are put in hotels, restaurants, drug stores, depots, etc., under contracts by which the owners or proprietors of these places become lessees, subscribers or patrons, there can be no discrimination in either the rates charged or the service furnished. Whether you may not make an arrangement by which public telephones may be installed in such places with measured service under which you pay a rental for the space occupied by your phones and all who use them, including the proprietor of the place and all his employees, pay the regular rate for the service furnished, is a matter upon which I now express no opinion, but leave the question open for further consideration at such time as you may see fit, if you do, to submit to this department for approval or disapproval, a definite arrangement.

Yours very truly,

GEORGE W. MILLER,

First Assistant Corporation Counsel.

DECEMBER 13, 1907.

JAMES HORAN, ESQ., Fire Marshal.

Dear Sir :

We have received from you original contract with the Nott Fire Engine Company, dated June 15, 1907, for the manufacture and delivery to the city of five fire engines at a price of \$5,763.00 for each engine; also, record of tests made of engines Nos. 694, 695 and 701 already delivered under the contract, showing that none of these three engines have developed the efficiency required in the specifications. We understand that you desire to waive the right to reject these particular engines on account of their inefficiency and to accept them on behalf of the city, but that you are unwilling to accept the remaining two if, when delivered and tested, it appears that they can not meet the tests referred to.

If, as a matter of fact, the two engines still to be delivered do not, when tested, develop the efficiency required, there is no doubt that you will be fully authorized to reject them, even though you may have waived similar objections in accepting the first three. Since the contract for these engines consists of several distinct and separate items, and a certain price is specified to be paid for each separate engine, each of which is to be tested on its own merits, it must be regarded as a severable obligation; that is, instead of being treated as one entire transaction, performance of which must be accepted as to the whole contract or not at all, it was clearly intended that it should be divisible as to the different items.

See *Bank of Antigo v. Union Trust Co.*, 149 Ill., 343.

Morriss v. Wibaux, 159 Ill., 527.

Keeler v. Clifford, 165 Ill., 544.

Beach on the Modern Law of Contracts, Sec. 731.

In other words, each item of the contract can be accepted or rejected on its own merits, and it has been held that where a contract is severable an acceptance of a part does not bind the purchaser to accept the balance.

U. S. Printing Co. v. Wilbur, 98 Ill. App., 20.

24 Am. & Eng. Ency. of Law, 2d Ed., p. 1092.

We would also call your attention to the following clauses

in the contract which would seem to fix, beyond a doubt, your authority to accept part of the engines and reject the others. At page 4 the right is reserved to the Fire Marshal to decide questions arising as to the proper performance of the contract,

“and should the party of the first part fail to complete and deliver the said engines, or either of them, in the time and manner herein stipulated, then to declare this contract forfeited, *either as to a portion or the whole thereof*, and relet the same.”

And on page 5 it is provided :

“In case the said Fire Marshal shall deem it necessary to declare this contract forfeited on the part of the said party of the first part as to the whole *or any part thereof*, it is hereby expressly stipulated and understood that said declaration of forfeiture shall not in any way relieve the said party of the first part from the covenants and conditions of this contract, but the same shall be and remain valid and binding on said party of the first part.”

In accepting the first three engines, however, we would advise you to state explicitly and in writing that the right of the city to reject the same on account of their failure to develop the required efficiency is waived only as to these particular engines, and is strictly without prejudice to your right to reject the others in case they do not meet the contract requirements in every respect. If you contemplate rejecting the engines still to be delivered, we would also recommend that you have the experts who conduct the tests selected in the manner provided by the specifications — that is, one by each party to the contract, and these two to select a third. The tests should also be conducted strictly in the manner provided.

The contract and records of tests are returned herewith.

Yours very truly,

WM. K. OTIS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 17, 1907.

W. A. EVANS, M. D., Commissioner of Health.

Dear Sir:

Your letter of December 14, addressed to the Corporation Counsel, has been referred to me for reply.

In answer to your inquiry as to the right of the City of Chicago to abate a nuisance and assess the cost of abatement as a lien upon the property upon which such nuisance is maintained or produced, I beg to say:

In the exercise of the police power possessed by the State it may, by statute, provide that the cost of abating a nuisance shall be assessed against or made a lien upon the property upon which such nuisance is maintained or produced. Such statutes have been passed and have been held constitutional in California, Massachusetts and Nebraska, and, perhaps, in other States.

Los Angeles County v. Spencer, 126 Cal., 670.

Bancroft v. Cambridge, 126 Mass., 438.

Horbach v. City of Omaha, 54 Neb., 83.

Joyce on the Law of Nuisances, Sec. 38.

But, I believe, from a careful examination of the authorities, that such assessments can be made and such liens exist only by virtue of special statutes authorizing them. There is no such statute in Illinois, and I am therefore of the opinion that the City of Chicago has no right to assess the cost of abating a nuisance as a lien against the property upon which it is maintained or produced.

It may be well to add, however, that in a proper case you may secure a judgment for the cost of abating a nuisance, and that such judgment is either a lien against all the real property of the defendant or can be made such by filing a transcript in the Circuit Court in accordance with the statute.

Yours very truly,

CLARENCE BOORD,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

DECEMBER 21, 1907.

JOHN D. RILEY, Esq., Superintendent of Maps.

Dear Sir:

Your letter of November 13 on the above subject, addressed to the Corporation Counsel, has, by him, been referred to me.

There are two distinct kinds of dedications recognized in Illinois,—statutory dedications and common-law dedications. A statutory dedication can only be made by the making, certifying, acknowledging and filing of a plat in accordance with the terms and provisions of Chapter 109 of the Illinois Statutes. When a statutory dedication is properly made it has the effect of a conveyance in fee simple to the city or other municipal corporation or body politic of the land dedicated.

Woolacott v. City of Chicago, 187 Ill., 504.

Lee v. Town of Mound Station, 118 Ill., 304.

Gebhart v. Reeves, 75 Ill., 301.

A common-law dedication of lands for streets or other purposes may be made in various ways,—by a plat which is not made, certified or acknowledged in accordance with the provisions of Chapter 109 of the Statutes, by deed, by grant, or even by parol declaration accompanied by the actual opening of the lands for the street or other public use. In the case of a common-law dedication the fee does not pass to the municipality; the fee is simply burdened with the public easement.

Marsh v. Village of Fairbury, 163 Ill., 401.

Thomsen v. McCormick, 136 Ill., 135.

Maywood Co. v. Village of Maywood, 118 Ill., 61.

Chicago, Rock Island & Pacific Railroad Co. v. City of Joliet, 79 Ill., 25.

Whether a dedication is made in accordance with the terms of the statute, or whether it be simply a common-law dedication, the act of the dedicator in making a plat, deed or a parol declaration, amounts really to an offer to dedicate until the dedication is accepted by the public.

Acceptance of a dedication may be shown in an almost unlimited number of ways: by user, by the municipality

taking charge of and repairing or improving the street or public ground dedicated, by some formal legislative or other act recognizing the street or public ground dedicated, by the making and adoption of a survey, and in many other ways.

Hamilton v. C. B. & Q. R. Co., 124 Ill., 235.

Village of North Chillicothe v. Burr, 186 Ill., 322.

Gentlemen v. Soule, 32 Ill., 271.

Until its acceptance by the public the dedication is not complete, and it may be revoked. After acceptance the street or other public ground becomes established.

Our Supreme Court has held that a city can not acquire land by deed from private parties at private sale for street purposes.

City v. Hayward, 176 Ill., 130.

People v. Village of Hyde Park, 117 Ill., 462.

C. & N. W. R. Co. v. Chicago, 148 Ill., 141.

Chicago v. Shephard, 8 Bradw., 602.

But while the city can not by deed acquire land for street purposes at *private sale*, it is well settled that land may be *dedicated* to the city for street purposes by deed. While such a deed would not have the effect of conveying title to the city in fee simple, it does have the effect of a common-law dedication when accepted by the city. It is no objection to the validity of the dedication that the city is unable to take title as grantee. This subject was discussed by the United States Supreme Court in the leading case of *City of Cincinnati v. The Lessees of White*, 6 Peters, 431. In this case, which is a leading case on the subject, the court said:

“Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title; applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. *But that is not the light in which this court has considered such dedications for public use.* The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor; and secure

to the public the benefit held out, and expected to be derived from, and enjoyed by the dedication."

In *Godfrey v. City of Alton*, 12 Ill., 29, the court said:

"The statute of frauds does not apply to the dedication of ground to the public. Such a *dedication may be made by grant or other written instrument*, or it may be evidenced by acts and declarations, without writing. No particular form is required to the validity of a dedication. It is purely a question of intention.

In *Smith v. Town of Flora*, 64 Ill., 93, the court said:

"Dedications may be proved in every conceivable way — by a survey and plat alone, *and by grant*, by user and by the acts and declarations of the owner. *Godfrey v. City of Alton*, 12 Ill., 29; *Marcy v. Taylor*, 19 Ill., 634."

In *McIntyre v. Storey*, 80 Ill., 127, the court said:

"A dedication of the right of way for a highway may be variously proven. It may be established by a grant or written instrument, or by the acts and declarations of the owner of the premises. It may be inferred from long and uninterrupted use by the public, with the knowledge and consent of the owner; but this court has had frequent occasion to say there must be a clear intent shown to make the dedication. The evidence offered for that purpose should be clear, either of an actual intent so to do or of such acts or declarations as will equitably estop the owner from denying such intent. *Marcy v. Taylor*, 19 Ill., 634; *Kelly v. City of Chicago*, 48 Ill., 388; *Godfrey v. City of Alton*, 12 Ill., 29.

In the following cases dedications have been established by deed:

Richeson v. Richeson, 8 Ill. App., 204.

Dougan v. Greenwich, 77 Con., 444.

Browne v. Inhabitants of Boudoinham, 71 Me., 144.

Cady v. Conger, 19 N. Y., 256.

Mayo v. Wood, 50 Cal., 171.

Town of Harpers Ferry v. Kaplon, 52 S. E., 492.

See also:

Elliott on Roads and Streets, 2d Ed., Par. 121.

Amer. & Eng. Enc. of Law, 2d Ed., Vol. 9, p. 55.

Cyc., Vol. 13, p. 454.

Trickey v. Schalder, 52 Ill., 78.

In view of the principles of law applicable to the situation which you describe in your letter, I am of the opinion that you should proceed as follows:

(1) You should secure (as you are now doing) a complete list of all quit claim deeds to the City of Chicago of lands to be used for streets, alleys or other public purposes.

(2) You should then ascertain whether or not the lands purported to be conveyed by such quit claim deeds have been accepted by the city.

(3) Where you find that there has been no acceptance of land conveyed, and where it is desirable that, if not too late, the city should accept the conveyance, and thus acquire for the public an easement in the land in question, you should report to this department all the facts, so that it may be determined whether or not the rights of the city under the conveyance may be saved. Where there has been no acceptance, and where the city does not want the land conveyed, nothing further need be done. Where there has been an acceptance, you should, if possible, secure from the grantor in the deed a plat executed in conformity with the provisions of Chapter 109 of the Illinois Statutes, and the plat should then be recorded. In case such a plat can not be obtained, you should then prepare (in your department) a plat showing the location and dimensions of the land conveyed to the city and place this plat on file in the office of the Recorder.

It follows that in cases where there has been no acceptance of the conveyance by the city, the holder of a tax deed or tax certificate has the usual rights under such a deed or certificate. In cases where there has been an acceptance by the city you need not concern yourself about the issuing of tax deeds or certificates, unless the deed or certificate is issued before such acceptance. Where the tax deed or certificate issues before acceptance by the city the holder has his usual rights. Where lands are in fact a city street, alley or other public ground the holder of a tax deed will take at most the fee subject to the public easement. The rights of the public will in no way be lessened by the tax deed. It is immaterial to the

city who owns the fee where there has been but a common-law dedication, for the owner of the fee can not impair the public easement.

Yours very truly,

EDWIN A. CASSEL,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 28, 1907.

ARTHUR D. WHEELER, Esq., Chicago Telephone Company.

Dear Sir:

I have your communication of recent date inquiring whether or not your company has the right to provide in your contracts for flat-rate service that payments shall be made *in advance*.

My understanding is that I have already approved a form of contract for flat-rate service which so provides, but I have again and more carefully considered the question and here advise as to my conclusions:

Section 6 of the ordinance of November 6, last, provides for services under yearly contracts payable monthly, but contains no provision as to whether rates shall be paid in advance or after service has been furnished, so that the determination of this question is not controlled by the language of the ordinance itself.

A telephone company, like a gas company, a water company or an electric light company engaged in furnishing service to the public under grants from municipalities, is a public-service corporation and governed and controlled by the rules which relate thereto.

Such companies may prescribe reasonable rules and regulations for the government and conduct of the business carried on by them, and such rules and regulations will be recognized by the courts.

In *Shepard v. The Milwaukee Gas Light Co.*, 6 Wis., 326, the right of the company to demand security for gas consumed or a deposit of money to secure payment thereof was

held to be just and necessary to guard against loss. It was recognized by the court that the delivery of gas is necessarily its consumption, and that, as the amount delivered is ascertained by the amount consumed, it was considered just and right that the company should not be compelled to furnish without reasonable security for payment in convenient amounts and at proper periods.

In *Williams v. The Mutual Gas Co.*, 52 Mich., 499, the right of the company to insist upon a deposit to protect it against loss from furnishing gas to a hotel was sustained as a reasonable regulation.

In *Shiris v. Ewing*, 29 Pac. Rep., 320, the Supreme Court of Kansas sustained as a reasonable regulation a rule authorizing a water company to shut off its customers' supply of water for violation of a rule intended to prohibit waste.

In *Owensboro Gas Light Co. v. Hildebrand*, 42 S. W. Rep., 351, the court of appeals of Kentucky declined to lend its approval to a requirement that Hildebrand deposit a stated sum of money as security for his further consumption of gas and electricity, but based its ruling upon the ground that the record disclosed no rule of the company in force making such a requirement and applying it generally to the patrons of the company, but indicated that this was a requirement arbitrarily applied to that particular customer, which the court held was an unjust discrimination; but the opinion expressly holds that such companies "may, however, fix reasonable rules and regulations applicable to all the consumers alike."

In the *Williams* case, *supra*, the court said (p. 501) :

"The company, however, in the discharge of its duty, may govern its action by reasonable rules and regulations, and when it has done so, all persons dealing with it, as well as the company itself, must yield obedience thereto."

In the *Shepard* case, *supra*, the court said (p. 335) :

"We wish to be distinctly understood that in our opinion they (companies) have a right to make all such needful rules and regulations for their own and the convenience and security of the public as are reasonable and just, and to exact a promise of conformity thereto."

The first paragraph of Section 6 of the ordinance in question requires your company to furnish, upon demand, service of any of the "classes or kinds" mentioned in that section "without discrimination," etc.

I am of the opinion that a requirement that rates must be paid in advance, where applied to *all* subscribers or patrons of the same class or kind of service, is a reasonable requirement, and one which the company has the right to make. You have not the right, however, to insist that some subscriber or subscribers to the same class of service be required by the terms of their contracts to pay in advance, while others are permitted to pay after service is furnished, for that would amount to a discrimination between subscribers of the same *class or kind*. All subscribers must be treated alike in that regard.

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JANUARY 2, 1908.

JOHN D. RILEY, ESQ., Superintendent of Maps.

Dear Sir:

Your letter of December 23, addressed to the Corporation Counsel on the above subject has, by his direction, been referred to me.

I have made a careful search of the records, and I have had made, also, an examination of the land within the boundaries of that portion of Colfax (Ashkum) avenue in question, by one of the engineers of the Bureau of Streets, and I find the facts to be as follows:

The Calumet & Chicago Canal & Dock Company made, executed and acknowledged a plat of "South Chicago," being a subdivision "of the E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ and parts of the east fractional $\frac{1}{2}$ of fractional section 6 north of the Indian Boundary Line, and that part of fractional section 6 south of the Indian Boundary Line, lying north of the Michigan Southern R. R., and fractional section 5 north of the Indian Boundary Line, all in T. 37 N., R. 15 E. of 3d P. M."

This plat showed Ashkum avenue to be 100 feet in width from Eighty-seventh to Ninety-fifth streets. The quarter section line, the west line of the lands platted, was located within the boundary of the street, as shown on the plat. At Eighty-seventh street the quarter section line was exactly in the center of Ashkum avenue, and at Ninety-fifth street it was thirty-two feet from the east line and sixty-eight feet from the west line of the avenue. No land west of the quarter section line was included within the lands designated in the title to the plat; in other words, all of Ashkum avenue west of the quarter section line (which was more than half of the avenue as shown on the plat) was in lands not included within the lands designated in the title to the plat. An examination of the abstract of title submitted by you, together with your letter of December 23, shows that at the time of the filing and recording of the plat in question the Calumet & Chicago Canal & Dock Company was the owner of the land immediately west of the lands subdivided by the plat. This plat was approved by the President and Board of Trustees of the Village of Hyde Park, and was filed for record in the office of the

Recorder of Cook County January 17, 1874, and recorded March 6, 1874, in Book No. 7 of Plats, pages 7, 8, 9 and 10, as Document No. 145,821.

By warranty deed dated August 27, 1890, and recorded on the same day in Book 3153 of Records, page 314, the Calumet & Chicago Canal & Dock Company conveyed to Joseph O. Morris and Alfred H. McGonagil land west of the land platted in the South Chicago subdivision, between Ninety-first and Ninety-fifth streets, extended. This deed purported to convey to the grantees the land up to and immediately west of the quarter section line; that is, it conveyed to them that part of Ashkum avenue as shown on the plat of South Chicago, between Ninety-first and Ninety-fifth streets, west of the quarter section line.

On July 15, 1891, Joseph O. Morris and Robert A. Davis, the then owners of the land between Ninety-first and Ninety-fifth streets and immediately west of the lands described in the title to the plat of South Chicago, filed for record a plat of "South Chicago Heights," being a subdivision of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, Sec. 6, N. of Indian Boundary Line, T. 37 N., R. 15 E. of 3d P. M., except railroad lands." This plat was approved by the Examiner of Subdivisions of the City of Chicago, July 15, 1891, and recorded in Book 50 of Plats, page 37, as Document No. 1,504,332. It showed that part of Ashkum avenue west of the quarter section line to be but thirty-three feet wide for the entire distance from Ninety-first to Ninety-fifth streets.

The land immediately north of the subdivision made by Morris and Davis, and south of the railroad right of way, was subdivided by the plat of Ira Holmes' Addition to South Chicago, being a subdivision of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 6, T. 37 N., R. 15 E. of 3d P. M. This plat was recorded March 25, 1891, as Document No. 1,438,560. It showed Ashkum avenue from Ninety-first street north to the railroad right of way to be 100 feet wide.

The land immediately west of the original plat of South Chicago and north of the railroad right of way was subdivided by the plat of A. B. Meeker's Addition to South Chicago, being a subdivision of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of frac-

tional section 6, N. of the Indian Boundary Line, T. 37 N., R. 15 E. of 3d P. M. This plat was recorded October 26, 1882, as Document No. 428,480. It showed Ashkum avenue from the railroad right of way north to Eighty-seventh street to be 100 feet wide.

By ordinance passed January 14, 1895, the Common Council changed the name of Ashkum avenue to Colfax avenue.

The investigation made by the engineer of the Bureau of Streets shows that Ashkum avenue is used by the public as a street from the railroad right of way north to Eighty-seventh street, but that it is not used and has never been used from the railroad right of way south to Ninety-fifth street. North of the railroad track the avenue, as actually used, is 100 feet wide. South of the railroad tracks there are no marks, fences or monuments to show how wide the street actually is; and no improvements of any kind, such as paving, sidewalks, sewers or water pipes, have been placed in that part of the street south of the railroad right of way.

The engineer's examination further shows that there is no crossing over the railroad tracks at Colfax avenue, and that the railroad right of way is fenced up on both sides; there is no access to that part of Colfax avenue south of the railroad track from that part north of the track. The street south of the track has been closed by these railroad fences for many years.

In view of the fact that in the original plat of South Chicago, made by the Calumet & Chicago Canal & Dock Company, that part of Ashkum avenue west of the quarter section line, as actually shown on the plat, was not included within the lands designated in its title, there may be some doubt as to whether or not it was intended by that plat to dedicate that part of the avenue west of the quarter section line. However, because of the fact that Ashkum avenue is so clearly shown upon the plat, and because of the further fact that the land immediately west of the quarter section line was owned by the Canal & Dock Company, I assume, for the purpose of this opinion, that there was an intent to dedicate Ashkum avenue as actually shown upon the plat; but, inasmuch as

that part of Ashkum avenue west of the quarter section line was not included within the lands designated in the title to the plat, I am of the opinion that the dedication was, at best, but a common-law dedication. It is well settled in Illinois that a plat not executed and acknowledged according to the statute may operate as evidence of a common-law dedication.

The Maywood Company v. The Village of Maywood, 118 Ill., 64.

Trustees of First Evangelical Church v. Walsh, 67 Ill., 363.

Godfrey v. The City of Alton, 12 Ill., 30.

In the case first above cited the court said, on page 69 :

“A dedication may be made by survey and plat alone, without any declaration either oral or on the plat, when it is evident from the face of the plat that it was the intention of the proprietor to set apart certain grounds for the use of the public.”

Assuming that the designation of the western part of Ashkum avenue, on the South Chicago plat, was a good common-law dedication, such dedication would not become effective until accepted. Until accepted a dedication is not complete and may be revoked. Acceptance of a dedication may be shown in an almost unlimited number of ways — by user, by the municipality taking charge of and repairing or improving the street, by some formal legislative or other act recognizing the street as dedicated, by the making and adoption of an official survey, and in many other ways.

Village of North Chillicothe v. Burr, 186 Ill., 322.

Hamilton v. C. B. & Q. R. Co., 134 Ill., 235.

Gentleman v. Soule, 32 Ill., 271.

A municipality may accept but part of a street dedicated for public use. It is not under obligations if it accepts a part to accept all.

Jordan v. City of Chenoa, 166 Ill., 530.

City of Chicago v. Drexel, 141 Ill., 89.

The facts in the case as shown by the records and by the report of the engineer afford no evidence of the acceptance by the city of that part of Ashkum avenue as dedicated by the South Chicago plat south of the railroad right of way.

There has been no user, no monuments have been erected by the city, no improvements have been made, and no official action has been taken with reference to that part of the street except the changing of the name in 1895, and that took place after the filing of the plat of South Chicago Heights.

Even if some fact of which I have not been advised, or some action done or taken many years ago, might be held to be evidence of acceptance by the city of that part of Ashkum avenue south of Ninety-first street, as originally platted by the Canal & Dock Company (100 feet wide), in my opinion there is much evidence of an abandonment by the city of any right which it may have gained by such acceptance. It has allowed that part of the street north of the railroad right of way to be fenced off from the rest of the street; it has provided no means of access to that part of the street south of the railroad right of way; it has approved a plat showing a narrower street; and has taken absolutely no steps to claim the south part of the street for public use. It is well settled in this State that the rights of the public in a street may be abandoned, and when so abandoned by the municipality the rights of the public cease.

Village of Auburn v. Goodwin, 128 Ill., 57.

Village of Winnetka v. Prouty, 107 Ill., 218.

The Secretary of the Calumet & Chicago Canal & Dock Company advises me that no lots have been sold on the east side of Ashkum avenue south of the railroad right of way. Lots recently have been sold, however, on the west side of the avenue, but such lots have been sold with reference to the plat of South Chicago Heights. The purchasers of the lots on the west side, having purchased with reference to the street as it is shown on the South Chicago Heights plat, have a right to have the street, as shown on that plat, open, irrespective of whether or not there has been an acceptance by the city. It can not voluntarily be closed by the owners of the adjacent unsold lots.

On this whole subject my conclusion is as follows: Ashkum (now Colfax) avenue, as now established, is 100 feet wide from Eighty-seventh street to the railroad right of way; from the railroad right of way south to Ninety-first street a

strip of land 100 feet wide has been duly dedicated as and for Ashkum avenue; from Ninety-first street to Ninety-fifth street Ashkum avenue is of a width varying from eighty-three feet at Ninety-first street, to sixty-five feet at Ninety-fifth street. The west line of the street as shown upon the South Chicago Heights plat, filed by Morris and Davis in 1891, in my opinion, is the true west line of Ashkum avenue between Ninety-first street and Ninety-fifth street.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

JANUARY 3, 1908.

W. A. EVANS, M. D., Commissioner of Health.

Dear Sir:

Your request for a digest of law upon the power of your department in the matter of vaccination has been referred to me.

In about one-third of the States, including California, Georgia, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New York, Wyoming, Pennsylvania, Rhode Island, South Dakota, Virginia, and perhaps a few other States, there are statutes providing that the local authorities may exclude unvaccinated children from the public schools. Under such statutes it has been held that the prevalence of smallpox, or imminent danger therefrom, is not necessary to the exercise of the power of exclusion.

Bissell v. Davison, 65 Conn., 183, 29 L. R. A., 2251.

Re: Viemeister, 179 N. Y. 235, 70 L. R. A., 796.

But in other cases it has been held that the exercise of the power of exclusion under such statutes is justifiable only when smallpox exists, or there is imminent danger of contagion therefrom.

Morris v. Columbus, 102 Ga., 792, 42 L. R. A., 175.

In a number of cases, in the absence of a statute authorizing the exclusion of unvaccinated children from the public

schools, it has been held that in case of an epidemic of smallpox, or reasonable ground to fear such an epidemic, the local authorities have the power to exclude unvaccinated children from the schools. This power is based on the police power, to do any and all things to protect the health of the people when there is actual danger of contracting the disease.

State v. Zimmerman, 86 Minn., 363, 58 L. R. A., 78.

Blue v. Beach, 155 Ind., 129, 50 L. R. A., 64.

Duffield v. Williamsport, 162 Penn. St., 476, 24 L. R. A., 152.

State v. Board of Education, 21 Utah, 401.

But the exercise of this power is not justifiable unless there is an epidemic of smallpox or reasonable ground to fear such epidemic.

In a number of States, including Connecticut, Georgia, Kentucky, Maryland, Massachusetts, Mississippi, North Carolina, Pennsylvania (in second class cities), South Carolina, Virginia and Wyoming, there are statutes under which vaccination of all persons may be ordered by the local authorities, and a penalty may be inflicted for not complying with such order.

State v. Hay, 126 N. C., 999, 49 L. R. A., 488.

Commonwealth v. Pear, 183 Mass., 242, 67 L. R. A., 935.

Morris v. Columbus, 102 Ga., 792, 42 L. R. A., 175.

Jacobson v. Mass, 197 U. S., 11.

It is doubtful whether these statutes have ever been enforced except in cases where smallpox existed or where its introduction was apprehended.

In no State is there a statute authorizing the forcible vaccination of a person against his will, nor have I been able to find a case where it has been done.

There is no statute in Illinois which expressly authorizes the City Council, or other local authorities, either to require children to be vaccinated as a prerequisite for admission to the public schools, or to require all persons to be vaccinated under a penalty.

The power of the city is based upon the 78th paragraph of Section 1 of the Cities and Villages Act (Hurd's Rev. Stat. 1906), which empowers the City Council:

“To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease”;

and the 75th paragraph of the same section which empowers the City Council:

“To appoint a Board of Health and prescribe its powers and duties.”

In *Potts v. Breen*, 167 Ill., 67, it was decided that the State Board of Health, under a statute providing that it shall have general supervision of the interests of health and life of the citizens, and shall have authority to make such rules and regulations as it may, from time to time, deem necessary for the preservation or improvement of the public health, *when the remainder of the statute imposes and confers specific duties and powers by which the general nature of the statute is limited*, has no power to require children to be vaccinated as a condition of attending school. The court also said in that case that school directors and boards of education have no authority to exclude children from the public schools for refusal to submit to vaccination, *unless in cases of emergency in the exercise of the police power it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox*.

In *Lawbaugh v. Board of Education*, 177 Ill., 572, the court held that neither the city council nor the city board of health has power to require compulsory vaccination as a prerequisite to attend the public schools, *unless smallpox exists in the community or there is reasonable ground to apprehend its appearance*.

There is a very plain implication in these two cases that the local health authorities have the power to make vaccination a prerequisite to admission to the public schools when smallpox is prevalent, or there is a reasonable ground to apprehend its appearance.

In my opinion, the City Council, under our statutes, has no power to require compulsory vaccination as a prerequisite for admission to the public schools, or to require parents or guardians to vaccinate all minors, except in cases of necessity because of the existence of smallpox or threatened contagion

therefrom. Therefore, I believe Sections 1254 and 1255 of the Revised Municipal Code of Chicago are void for want of power in the City Council to enact ordinances so broad in their scope. In my opinion, Sections 1252 and 1253 of the Code are valid, and may be enforced under the penalty prescribed, as they are provisions for cases of emergency or necessity only.

However, I believe the Commissioner of Health has power to make rules and regulations requiring vaccination as a condition of attending school where smallpox exists in the community, or there is reasonable ground to fear its appearance. The Commissioner of Health is the chief health officer of the city, and has extensive police powers in matters pertaining to the health of the people and the sanitary conditions of the city. Section 1028 of the Municipal Code provides, in part, that:

“Whenever he (the Commissioner) shall hear of the existence or epidemic of disease, such as diphtheria, measles, membranous croup, puerperal fever, scarlet fever, smallpox, typhoid fever, whooping cough, etc., he shall investigate the same, and adopt measures to arrest its progress.”

Section 1252 of the Code provides, in part, that:

“The Commissioner of Health may take such measures as he, from time to time, may deem necessary to prevent the spread of smallpox, and may require any person or all persons in the city to be vaccinated within such time as he shall prescribe.”

Section 1035 of the Code provides that in cases of contagious or epidemic disease, or of danger therefrom, the Commissioner of Health may take and enforce emergency rules and regulations; such rules and regulations to be reported to the City Council for approval.

Under the powers thus conferred upon him, either expressly or by implication, I believe the courts will uphold the rules and regulations of the Commissioner of Health requiring the vaccination of children as a prerequisite of admission to the public schools whenever there is an epidemic of smallpox or reasonable ground to fear such an epidemic. How far the court would go in deciding when an epidemic exists, or what

constitutes reasonable ground to fear an epidemic of smallpox, is a matter of some conjecture. However, it has been held that there may be reasonable ground to fear an epidemic of smallpox even though there is no case in the city, if smallpox is prevalent in a neighboring city.

Morris v. Columbus, 102 Ga., 792, 42 L. R. A., 175.

Yours very truly,

CLARENCE N. BOORD,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

JANUARY 8, 1908.

H. L. LUCAS, Esq., Superintendent of Water Pipe Extension.

Dear Sir:

Your request, of recent date, made to the Corporation Counsel for an opinion in reference to the validity of assignments of wages by city employees; also a document directed to Water Department, purported to be a notice of assignment "of the money in your hands, held by you as deposit, security or otherwise, belonging to Daniel W. Connell, or in which he is in any way interested, as well as the money now due or which may become due and accrue to him from you for services rendered, commission, rebate or any other transaction had with you, free from all claims of exemption prior and superior to the rights or claims of any and all persons whomsoever, from the 30th day of June, 1905, to the 30th day of June, 1908," have been referred to me.

In my opinion, this particular assignment is not good, being directed to Water Department. It should be directed to City of Chicago. The Water Department having no legal existence, not being a corporation, private or public, it being but a department of the city, its employees are city employees.

In the case of *City of Chicago, et al., v. People*, 98 Ill. App., 517, the court said:

"The doctrine is well settled that a municipal officer can not assign his unearned salary. His undertaking so to do is but an undertaking, unenforceable and of no validity. The law

also prohibits assignments of salary being had by indirection or effected by having the official appoint an attorney authorized to receive the salary and turn the same over to an assignee.

“The performance of public service is secured by protecting those engaged in performing public duties, and it is not upon the ground of their private interest, but upon the necessity of securing an efficient public service, by seeing to it that the funds provided for the maintenance of government officials should be received by them at such periods as the law has appointed for their payment.

“If assignments of the salaries of public officers were permitted, then the assignees would be entitled to receive the salaries directly, and thus to take the place of the assignors in respect to the emoluments, leaving the duties to be discharged by said officers, a barren charge, to be borne by the assignees. Such a condition of affairs would inevitably produce results disastrous to the efficiency of the public service.

“It would be in the highest degree harmful to the public that municipal corporations should be permitted to be turned into agencies through which the collection of private debts might be enforced.

“A municipal corporation exists for the public welfare only, and it can not be forced into a position by which its duty as to its officials in respect to their salaries shall be, not to pay them in accordance with their lawful right, but to pay the debts which they may be owing to creditors, or their stipend to those to whom they might have assigned it. *Bliss v. Lawrence*, 58 N. Y., 442; *Schwenk v. Wyckoff*, 46 N. J. Equity, 560; *Am. & Eng. Ency. of Law* (2d Ed.), Vol. 2, p. 1033; *King v. Hawkins*, 16 Pac. Rep., 434; *Merwin v. City of Chicago*, 45 Ill., 133; *Addyston Pipe & Steel Co. v. City of Chicago*, 170 Ill., 580; *State v. Williamson*, 118 Mo., 146; *People v. Omaha*, 2 Neb., 169; *Wallace v. Lawyer*, 54 Ind., 501; *Hightower v. Slayton*, 54 Ga., 108; *Schloss v. Hewlett*, 81 Ala., 266; *Johnson v. Pace*, 78 Ill., 143.”

In *Bliss v. Lawrence*, 58 N. Y., 442, deciding “an assignment by a public officer of the future salary of his office is contrary to public policy and void,” the court said:

“Then there is a second ground of public policy, for

which the case of *Palver v. Vaughan* (3 Swanst., 173) is the leading authority, which is this: That independently of any corrupt bargain with the appointer, nobody can deal with the fees of a person who holds an office of this description, because the law presumes, with reference to an office of trust, that he requires the payment which the law has assigned to him for the purpose of upholding the dignity and performing properly the duties of that office, and therefore it will not allow him to part with any portion of those fees either to the appointer or to anybody else. He is not allowed to charge or incur them."

Schwenk v. Wyckoff, 46 N. J. Equity, 560, the court said:

"Unearned half pay of retired officer of the army is not assignable."

Quoting: *Lidderdale v. Duke of Montrose*, 4 T. R., 248:

"The validity of a voluntary assignment of the half pay of an officer came before the same court; it was held that there was no distinction to be made between voluntary assignment and an assignment as in the last mentioned case under the insolvent debtor's act and so that voluntary assignment was also held to be void."

After investigating authorities, I am convinced that the *unearned* salaries of city employees can not be assigned, on the ground such action would be against public policy, and such assignments may be disregarded. The tendency of the courts is to sustain assignments of *past due* salary or wages, and, therefore, regard should be paid to *such* assignments.

Yours truly,

ROBERT, L. CAMPBELL,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JANUARY 9, 1908.

JOHN A. RICHERT, Esq., Chairman Building Committee.

Dear Sir:

Your Committee has submitted to this department the following proposed amendment to the ordinances relating to the Building Department:

“The Commissioner of Buildings, before entering upon the duties of his office, shall execute a bond to the city in the sum of \$25,000.00, with such sureties as the City Council shall approve, conditioned for the faithful performance of his duties as the Commissioner of Buildings.”

In this connection you ask to be advised whether a bond following the provisions of this proposed amendment to the Code will limit the liability of the Building Commissioner to his own acts, or whether it will include the acts of his subordinates.

This proposed amendment is so drawn as to limit the obligation of a bond, following the language of the proposed amendment, to the acts of the Building Commissioner, so that by its terms it would not be broad enough to include the acts of his subordinates; but back of this question of construction growing out of the phraseology of the amendment is the broader question which goes to the extent of the liability of the Building Commissioner for the acts of his subordinates.

The Building Department is created under, and the building ordinances are an exercise of, the police powers of the State. It is said in Abbott on Municipal Corporations (Vol. 1, Sec. 125):

“Another valid exercise of the police power by the State is the adoption of rules and regulations in regard to the construction and occupation of buildings. These regulations have for their direct purposes, not only the protection of life, limb and property, but also the preservation of the public health. The use to which certain buildings can be put may result in a condition exceedingly deleterious to the health and safety, not only of the occupants of the buildings themselves, but of persons in the immediate vicinity; and the State, in such case, has the unquestioned right of regulation. Through the cupidity or negligence of property owners, buildings may

become unsafe for use, and the proper exercise of the police power by the State includes the passing of regulations remedying such conditions. It also includes the right to control or regulate, in the first instance, having as a purpose the protection of life, health and property, either the dimensions, the manner, or the place of construction. This right to regulate the construction of buildings extends to repairs as well as alterations or additions and ornaments or appurtenances. The exercise of the power in this respect goes further and includes the right of inspection of buildings used for certain purposes or by certain classes of people. The right to exercise the power also carries with it the right to enforce orders or regulations of the State or municipal authorities, looking to the demolition or the purification of unwholesome, unsafe or infected premises," etc.

See also:

King v. Davenport, 98 Ill., 305.

Patterson v. Johnson, 214 Ill., 481.

McQuillan on Municipal Ordinances, Sec. 470.

Considering, for the moment, the question of the city's liability for the acts of its officers, agents or employees in the performance of duties entrusted to them in connection with governmental functions of the city, as distinguished from those things it does in its private or proprietary capacity, it is a well settled principle of law that in such cases there is no liability on the part of the city.

A municipality creates and maintains a police department in the exercise of its governmental functions and of its police powers for the benefit of the public, and for the promotion and preservation of the public welfare; and it has been uniformly held that municipalities are not liable for the illegal or negligent acts of its police officers.

Quoting from *City of Chicago v. Williams*, 182 Ill., 135, the court said (p. 137):

"Police officers are not agents or servants of the city appointing them, within the rule making the corporation answerable for their acts, nor is a municipal corporation liable for the nonfeasance or misfeasance of the officers of its police . . . But where acts are done by the officers of towns and

cities in their public capacity in the discharge of duties imposed by the law for the public benefit and for the promotion and preservation of the public welfare, no private action lies, unless the right to bring it is expressly conferred."

The same principle has been applied to the acts of members of a fire department (*Wilcox v. City of Chicago*, 107 Ill., 334) and to the employees in public hospitals (*Tollefson v. City of Ottawa*, 129 Ill., App., 139).

Story on Agency (9th Ed.), Sec. 319, announces the doctrine thus:

"It is plain that the government itself is not responsible for the misfeasance or wrongs or negligences or omissions of duty of the subordinate officers or agents employed in the public service, for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses which would be subversive of the public interest."

Thus has the author stated both the rule and the reason for it, as applied to public officers generally, in so far as the question of liability of the government—national, state or municipal—may be concerned. Upon grounds of public policy the principle of *respondeat superior* does not apply. It is to be determined, then, whether this same principle extends a step beyond and exempts from liability a public official for the misfeasance, malfeasance or negligent acts of his subordinates. The same author, in the same section, proceeds immediately to this question in the following language:

"Our next inquiry, therefore, is whether the heads of its departments or other superior functionaries are in a different predicament. And here the doctrine is now firmly established, subject to the qualifications hereinafter stated, that public officers and agents are not responsible for the misfeasance or positive wrongs, or for the nonfeasance or negligence or omissions of duty of the subagents or servants or other persons properly employed by and under them in the discharge of their official duties."

The qualifications suggested by the author are those where the public official is guilty of ordinary negligence at

least, in not selecting persons of suitable skill, or in not exercising a reasonable superintendence or vigilance over their acts and doings.

The text of the author finds abundant support in the following cases:

Robertson v. Sichel, 127 U. S., 507.

City of Richmond v. Long, 17 Gratt., 375.

Wiggins v. Hathaway, 6 Barb., 632.

Hutchins v. Brackett, 22 N. H., 252.

Keenan v. Southworth, 110 Mass., 474.

An examination of these authorities will show that the subordinate officers or agents are considered and treated as officers or agents of the governments, rather than as agents or employees of the officer sought to be charged with their misdeeds. Where, as is the case with Chicago's Building Commissioner, the public officer does not make the selection and appointment of his subordinates, he can not be charged with responsibility if incompetent men are selected, and I am of the opinion that he is not liable personally for their acts, provided he exercises a reasonable superintendence and vigilance over them, in so far as their duties are performed under his directions.

From these conclusions it likewise follows that a bond given by the Building Commissioner, conditioned for the faithful performance of his duties as such officer, will not include the wrongful or negligent acts of his subordinates.

I transmit herewith a copy of the proposed amendment.

Yours very truly,

GEORGE W. MILLER,

First Assistant Corporation Counsel.

JANUARY 10, 1908.

ARTHUR D. WHEELER, Esq., Chicago Telephone Company.

Dear Sir:

I have your communication requesting an opinion from this department as to whether the first sentence of the last paragraph of Section 6 (a) of the ordinance of November 6, last, applies to the single party lines referred to in that por-

tion of Section 6 (a) which relates to measured service only; or, whether it has application also to the nickel prepaid service.

The rates for measured service provided for in Section 6 (a) are made to depend upon the volume of the service—i.e., the number of outgoing conversations or messages, except as to the single party line provided for at the rate of one dollar per day. As the number of outgoing conversations or messages increases the rate per conversation or message is made to decrease.

The provision of that section which you desire us to construe was manifestly intended to give the patron the same benefit by way of decreased rates on the aggregate number of outgoing conversations or messages where more than one single party line was used that he would get if all the outgoing conversations or messages went over a single line. In other words, for a single party line there is a rate of sixty dollars per year fixed, which includes twelve hundred outgoing conversations or messages, which is at the rate of five cents per conversation or message. For the next twenty-four hundred outgoing conversations or messages the rate is three cents per conversation or message; and above thirty-six hundred outgoing conversations or messages the rate is two cents each.

It was not the intention of the framers of this ordinance, as indicated by its context, nor does the language of that paragraph of Section 6 (a) now being considered, permit that one who, under the provisions of Section 6 (a) relating to measured service, procures the installation of two or more single party lines, as therein provided, should have the outgoing conversations or messages upon each line considered separately and be required to pay on each line the rates he would be required to pay if he had but a single line, but it was the intention that all outgoing conversations and messages should be computed as though sent over a single line, and the rate figured accordingly.

This excludes from the application of this provision of Section 6 (a) what is known as the nickel prepaid service, provided for in Section 6 (c); for that is a service with a fixed rate of five cents per outgoing conversation or message,

and the rate in no wise depends, except as to the initial guaranty, upon the amount of use to which the line is put.

In my opinion, that portion of the last paragraph of Section 6 (a), now under consideration, has no application to the nickel prepaid service, provided for in Section 6 (c).

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JANUARY 13, 1908.

WALTER H. WILSON, Esq., Comptroller.

Dear Sir:

On August 8, 1907, I transmitted to you an opinion on the question, whether life-insurance brokers, live-stock brokers and commission men should be required to obtain a broker's license under the provision of Chapter XIV of the Revised Municipal Code of Chicago of 1905, in order to transact their business in the city.

Recently I received a verbal request from a member of your department, asking me to state more specifically with reference to insurance brokers, the persons who shall be deemed to be within the provisions of Sections 196 and 197 of the Revised Municipal Code of Chicago of 1905.

Said Section 196 defines an insurance broker as follows:

"An insurance broker shall include any and every person or corporation engaged for others in negotiating contracts for insurance on life, buildings, vessels or other property, either directly or through any other broker or through any insurance agent, or with any insurance company other than an insurance company of which such person shall be an employee."

Section 197 reads as follows:

"Any person employed by a person or corporation licensed as a broker under the provisions of this chapter, who shall himself engage in the business of a broker, shall, notwithstanding the fact of such employment, be amenable to all the provisions of this chapter, and shall be required to take out a broker's license."

The language of Section 196 is to the effect that every person or corporation negotiating contracts for insurance is

a broker, except a person negotiating contracts with an insurance company of which he is an *employee*.

The former ordinance (Sec. 216, Revised Code of Chicago of 1897) excepted "the duly authorized agent" of an insurance company from within its terms instead of an "employee," as is the case with the present ordinance.

This brings up for consideration the question as to what is meant by an *employee* of an insurance company, and whether it includes within its meaning a "duly authorized agent."

Webster's Dictionary defines an *employee* as "one employed by another; a clerk or workman in the service of an employer."

An *agent* as "one who acts for, or in place of another, by authority from him; one intrusted with the business of another; a substitute; a deputy; a factor."

The Century Dictionary defines an *employee* as "one who works for an employer; a person working for salary or wages; applied to any one so working, but usually only to clerks, workmen, laborers, etc., and rarely to the higher officers of a corporation or government, or to domestic servants; as, the *employees* of a railroad company." This definition of employee was adopted in the case of *Palmer v. Van Santvoord*, 153 N. Y., 612.

An *employer* as "one who employs, a user; a person engaging or keeping others in service."

An *agent* as "a person acting on behalf of another, called his principal; a representative; a deputy, factor, substitute or attorney."

Anderson's Dictionary of Law states that "employee" is from the French, but has become naturalized in our language. Strictly and etymologically it means "a person employed"; but in practice in the French language it ordinarily denotes a person in some official employment.

"Employee is the correlative of *employer*. Neither term is restricted to any particular employment or service. *To employ* is to engage or use another as an agent or substitute in transacting business, or the performance of some service, it

may be skilled labor or the service of the scientist or professional man, as well as servile or unskilled manual labor."

"Employee usually embraces a laborer, servant or other person occupied in an inferior position. Applies equally to a person within or without an office, whether a servant or a clerk. An '*employee in an office*' is a person engaged in the performance of the proper duties of an office, whether his duties are carried on within or without the walls of the building in which the chief officer transacts his business."

Stone v. U. S., 3 Court of Claims, 262.

"An employee is a person who is employed; one who works for wages or a salary."

In re Cortland Mfg. Co., 45 N. Y. Supp., 630.

"The word 'employee' means a person employed. In general, the term 'agent' designates those employments where the person exercising them is not under the immediate control of the superior."

State v. Sarlls, 135 Ind., 195; 34 N. E., 1139, 1130.

In Louisville, etc., R. R. Co. v. Wilson, 138 U. S. 501, it was said that the word *employee* implies continuity of services and excludes those employed for a special single transaction.

In Anderson's Dictionary of Law an "insurance broker" is defined as "a person who negotiates contracts of insurance. He is agent for both parties. An 'insurance agent' is, ordinarily, the employee of the insurer only."

"*Employee* in its broadest sense includes every one in the service or employment of a corporation or individual."

Casualty Ins. Co.'s case, 82 Md., 533, 566.

In the case of Palmer v. Van Santvoord, 153 N. Y., 612, the court used the following language on page 616:

"When the words of the statute do not perfectly express the intention, they are to have a rational interpretation, to be collected from the words and the policy which may be reasonably supposed to have dictated the enactment, and the interpretation may be rigorous or liberal depending upon the interests with which it deals."

This policy of interpretation applies with equal force to ordinances with the qualification, however, that an ordinance must not contravene the general laws of the State.

In view of the authorities cited and also the decisions of the courts of this State, on the question of what constitutes an insurance broker, in cases which I shall cite hereafter, I believe the word "employee" as used in Section 196 of the Revised Municipal Code of Chicago of 1905, should receive a very liberal interpretation.

I am thus of the opinion that any person or corporation acting as the duly authorized agent of any insurance company or agents and negotiating contracts for insurance in such company or companies, whether such services are paid for in salary or commission, is an employee of such insurance company or companies within the intent and meaning of the ordinance.

On the question of what constitutes an *insurance broker*, the case of *McKinney v. City of Alton*, 41 Ill. App., 508, is instructive. This was a prosecution against appellants, A. R. McKinney & Son, for violating a city ordinance, which read as follows:

"Insurance agents representing corporations, companies or associations engaged in the business of soliciting or effecting life, fire or marine insurance, shall pay the sum of \$25 per year, and such license may be taken out for any term, not less than three months, nor more than one year."

The only question involved in that case was the power of the City of Alton to pass the ordinance in question. Appellee claimed this power by virtue of Clause 91 of Section 1, Article V of the Cities and Villages Act, which is as follows:

"To tax, license and regulate auctioneers, distilleries, breweries, lumber yards, livery stables, public scales, money changers and brokers."

The court uses the following language on page 511:

"The controversy arises over the question: What is the true definition and meaning of the word "brokers" as used in the act? If by the use of that word the legislature meant and intended to include 'insurance agents *representing* insurance companies,' then the ordinance, as to appellees, is valid,

otherwise not. In order to 'give a true construction to the paragraph quoted, and thereby correctly solve the question presented, certain well recognized rules apply. Among these is the rule that the legislature must be presumed to have used the word 'brokers' in its known and accepted signification, and intended, by the use of that word, to confer upon municipal corporations in the State the power to tax and license those persons only whose vocation was that of a broker, as the term is generally understood.

"In our judgment, there is a marked and well defined distinction between 'insurance agents *representing* corporations,' and that of mere brokers.

"Such insurance agents, during their employment, sustain a fixed and permanent relation to the companies they represent. They are clothed with general powers and authority, and assume responsibilities not conferred upon or assumed by brokers. They owe duty and allegiance to the companies employing them, and seek patronage only for the profit and benefit of such, and are precluded from soliciting insurance business for others. "

"The term *broker*, or *insurance broker*, is generally understood to mean a person who owes no duty or allegiance to any particular corporation. He is not one representing a particular corporation or corporations, within the meaning of the ordinance. He is free to procure insurance for others in any company he may select, and to solicit and procure business and patronage for any insurance company or companies he may select. In short, we agree with counsel for appellee that an insurance broker may be for certain purposes and at certain times an 'agent,' but an insurance agent *representing* corporations engaged solely in insurance business can not be an insurance broker or act as such."

Also on page 513, the court said:

"Our conclusion is that the word 'brokers' used in the act did not mean or 'include' insurance agents *representing* corporations, companies or associations engaged in insurance business. Hence, no power was conferred on appellee to enact and enforce said ordinance, and the same is void."

In the case of *City of East St. Louis v. Brenner*, 59 Ill. App., 604, the court uses the following language on page 606:

"The evidence shows the Metropolitan Life Insurance Company, of New York, is authorized to do business in East St. Louis, and that John Higginbotham is there its superintendent and general agent. The appellee (Brenner) was employed by the company, by such general agent, to canvass the city, present claims of the company to the favor of the public, solicit applications for insurance and collect premiums. He represented that company alone and worked for no other in any capacity. His pay was measured by his success in securing applications, which was received weekly, from the company only. When applications were taken by him, they were presented to the superintendent, who approved and issued policies thereon, or rejected them."

On page 608, the court uses these words:

" 'An insurance broker' is the middle man, and, for some purposes, is treated as the agent of both parties. Both parties, in such case, may without relation to each other, place their business in his hands with, it may be, conditioned terms, as with right of inspection or approval, etc.

"The business of appellee is not analogous to such transactions. He represents only one party as an agent, like any other solicitor or drummer, who travels, seeking to build up trade. The business of a 'broker' is to represent all parties, buyers or sellers, in his line. His business, as a business, is not to represent simply one person or company."

In the case of *Kings County Fire Insurance Company v. Swigert*, 11 Ill. App., 590, an action was brought by appellee to recover for loss under a policy of insurance against fire. The policy was obtained for appellee by one Kennedy, a member of the firm of E. E. Ryan & Co., insurance agents. The court said on page 599 of the opinion:

"There is no evidence of any employment by the defendant of either Kennedy or his firm to act as its agents, and, so far as there is any evidence on that subject, it shows affirmatively that the relation of principal and agent did not exist, and never had, in fact, existed between the defendant and them. They were insurance agents in the employ of one or

more insurance companies, the defendant not being of the number. *So far as they are shown to have dealt with agents other than those by which they were employed as agents they dealt as insurance brokers.*"

In *Ben Franklin Insurance Company v. Weary*, 4 Ill. App., 74, the court uses this language on page 77:

"It appears that the policy in suit was obtained through the agency of one E. W. Wells, an insurance agent or broker then doing business in Chicago. This man does not appear to have been in the employ of appellant; he was engaged on his own account in soliciting applications for insurance, and taking such applications, when procured, to various insurance offices and obtaining for the applicants policies of insurance."

And further, on page 78:

"He was in no sense an agent of appellant. He had not been employed by appellant to solicit applications for insurance; he was engaged as broker in obtaining applications on his own account, and afterward placing the insurance with such companies as he could induce to take the risks."

The case of *Bernheimer v. City of Leadville*, reported in 14 Colorado, 518, is, in many respects, similar to the case of *McKinney v. City of Alton*, cited *supra*. The following language is used on page 523 of the opinion:

"It is unnecessary, for the purposes of this case, to define the office of an insurance broker. It is sufficient to say that he usually acts for both parties; he represents no particular company; he is employed for a specific purpose. It is his business to act upon particular occasions. Plaintiff in error was the acknowledged agent and representative of a particular company. He was acting under a commission issued to him under the hand and seal of the Travelers' Life and Accident Insurance Company. He was the representative of that company within a particular district. He was authorized not only to take applications for insurance, but in the name of the company to make contracts of insurance and issue policies. The company was bound by his acts. It can hardly be said that in the conduct of its business plaintiff in error was the agent of such citizens as might apply to him for insur-

ance. He was not an insurance broker, within the purview of the statute."

A corporation transacting for itself the business which its charter authorizes it to do does not thereby become a broker, and its officers, by transacting such business, do not become liable to the penalty prescribed for carrying on a brokerage business without having taken out a license therefor.

Henderson v. State, 15 Ind., 234.

In the case of *Arff v. Star Fire Insurance Co.*, 125 N. Y., 57, it appeared that MacDonald and Van Alstyne were the duly commissioned agents of the insurance company, and that they had in their employ one Strecker, who solicited insurance for said agents exclusively, and received, as compensation, a commission on the applications which he procured and which were accepted by the agents. The court held that said Strecker was not a broker, and used the following language on page 64:

"However, these agents might characterize his (Strecker) employment, the fact upon the testimony in the case . . . leaves him, in my opinion, nothing more or less than a clerk or employee of these agents. He performs the same duty that would be performed by an individual employed as a clerk and told to do his business. The mere solicitation of insurance and the bringing of applications to these agents, who are to determine generally whether it shall, or shall not, be accepted, is not of such a nature that it can not be done by an ordinary clerk, nor does the doing of it in that way and under such circumstances, necessarily preclude the person who does it from occupying the position of clerk, and place him in the position of an ordinary insurance broker."

Further, on the bottom of page 65, the court says:

"An agent of an insurance company has the right to, and, indeed, it is the expectation of the company that he will, employ such clerks and other assistants as may be necessary and proper in order that he may do the business for which he has been appointed agent. Soliciting insurance is part of the business of such agents, and is not to be assumed that such solicitation can be made only by the agents personally, nor can it be held as matter of law that when it is made by some

person employed exclusively by them, that such solicitation, on the part of the person thus employed, makes him an insurance broker and takes away from him his character as clerk or employee of the agent. The fact that Strecker was compensated for his services to these agents by the commission on the business which he brought in is not conclusive upon the question of the capacity in which he worked."

In conclusion, I desire to say that it is a matter of some difficulty to state definitely all who are within the purview of the ordinance and those that are not. It depends upon the facts and circumstances in each particular case. It can be definitely stated, however, that clerks, agents, solicitors and representatives of one particular person or company and engaged in negotiating contracts of insurance for such person or such company exclusively, whether for salary or commission, are not insurance brokers.

I am also of the opinion that a person may be employed as the duly authorized agent of more than one person or company and not be considered a broker. An insurance broker is generally understood to mean a person, firm or corporation owing no duty or allegiance to any particular company or agent, and who writes insurance in any company that will accept his applications.

Yours very truly,

GEORGE DIERSSEN,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JANUARY 13, 1908.

ARTHUR D. WHEELER, Esq., Chicago Telephone Company.

Dear Sir:

I have examined the form of contract this day submitted in connection with public telephone nickel prepayment service to be installed in drug stores. The copy I have before me contains the correction in pen, specifically making the terms set forth on the reverse side thereof a part of the contract.

I have already expressed my views on the section of this ordinance prohibiting discrimination. My construction of that section you have in writing. There must be no discrimination, either in rates charged or in service furnished.

Nevertheless, the demand for public telephones is recognized and must be met. A most appropriate place for them, in fact, a place where the public is accustomed to look for them, is a drug store. There is nothing in the ordinance which prohibits your company from installing, in places accessible to the public, telephones for the public use, to be paid for at the prescribed rates by the user. The installation of a telephone equipment in a drug store occupies space in that store; requires that the store be accessible to the public who desire to use the phone during the usual business hours; makes it necessary that the public be permitted to go in and out of the store to use the 'phone, although many, who go in, go there for no other purpose, and in all, requires that your company procure from the possessor of such a store a service and privilege not obtainable from him except upon payment of fair and reasonable compensation.

This contract contemplates an arrangement with the druggist by which he will furnish what is necessary in the way of space, service, etc., in connection with the installation and maintenance of a public telephone, for which will be paid to the druggist the compensation provided for in the contract.

The druggist does not become a lessee, subscriber or patron of your company under this contract. It is his privilege to use the 'phone or not, and if he does he pays the same rate exacted from every other user of that 'phone; and I am of the opinion that such an arrangement is in no sense a violation of the provision of the ordinance relating to discrimination.

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JANUARY 15, 1908.

L. E. GOSSELIN, Esq., Deputy Comptroller.

Dear Sir:

By direction of the Corporation Counsel, your communication of January 13, 1908, requesting an opinion as to the duty of the Commissioner of Public Works with relation to the default of the aforesaid company in its contract with the City of Chicago, has been referred to me for reply.

This contract is to be construed with reference to its terms, as well as with reference to the Revised Municipal Code, which is by law made a part thereof.

Section 1850 of the Revised Municipal Code of Chicago of 1905 provides that:

"In all contracts executed by said commissioner on behalf of the city, the right shall be reserved to said commissioner to . . . adjust the difference of damages or price, if any, which the contractor, failing to properly construct such work . . . should pay to the city according to the just and reasonable interpretation of said contract."

The provision in the contract itself is substantially in the same language as that used in Section 1850 of the Code, excepting that the phrase "he *may* also adjust the difference" etc., is used, and in construing the meaning of the word "may" it is necessary to examine the foregoing section as well as the contract.

In a large number of adjudicated cases the word "may" has been construed to mean "shall" or "must," particularly in those cases where the doing of an act concerns the public at large. *Follmer v. Nuckolls County Commissioners*, 6 Neb., 204-9, holds that "the rule is well settled that the word 'may,' where the statutes direct the doing of a thing for the sake of justice or the public good, is the same as 'shall,' and must be so construed." In this case the word "may" was used in general statute 954, providing that the County Commissioners "may" let contracts to the lowest competitive bidders for the improvement of such roads as may be of general necessity. It was there held that the word "may" should be construed to mean "shall."

"'May,' as used in the act authorizing the appointing of

a board of public works in and for the City of Grand Rapids, and providing that in constructing sewers the board shall advertise for sealed proposals to execute the work, and for materials, and 'may' contract with the lowest responsible bidder, shall be construed to mean 'shall.' "

O'Brien v. City of Grand Rapids, 56 Mich., 95.

" 'May,' as used in statutes calling for its exercise to protect the public interests or individual rights, is construed as imperative, and means 'shall.' "

State v. Buffalo County Commissioner, 6 Neb., 454.

As used in the Act of 1872, providing that a board of supervisors may allow certain claims for work done and material furnished, not to exceed the reasonable cost thereof, "may" will be construed to mean "shall."

"Here was something contracted to be done for the sake of justice, and in such a case the work 'may' is generally construed to mean 'shall.' "

People v. Livingston County Sup'rs, 68 N. Y., 114.

Under these authorities we must advise that it is his imperative duty to assess just and reasonable damages against the defaulting company, and in this regard the Commissioner has no discretionary power.

Yours very truly,

HOWARD W. HAYES,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

JANUARY 20, 1908.

W. J. McCURT, Esq., Superintendent of Water.

Dear Sir:

Replying to your verbal request as to the extent to which "charitable, municipal, religious or educational institutions" are exempt from payment of water rates and charges, I desire to submit the following:

Under the Constitution all property is primarily subject to taxation, and in reference to exemptions the court held, in the case of *Montgomery, et al., v. Wyman, et al.*, 130 Ill., 17:

“All laws exempting property from taxation are to be strictly construed and all reasonable intendments will be indulged in favor of the State, and all doubts solved in its favor.”

Also in the case, *In the matter of Chas. P. Swigart, Auditor of Public Works*, 123 Ill., 267:

“Where the law describes property entitled to exemptions from taxation, by reference to the character of its ownership and the nature of the use to which it is put, the property claimed to be exempt must be owned and used in the manner specified in the law.”

Section 2402 of the Revised Municipal Code of 1905, as amended on page 216 of Supplement 2, provides:

“The Commissioner of Public Works shall remit and cancel all water rates and charges heretofore levied and assessed or which may hereafter be levied and assessed against such property of any charitable, municipal, religious or educational institution in the city as is used in the immediate conduct and carrying on of the charitable, municipal, religious or educational purposes of such institution and which is not used for gain or profit or rented, conducted, maintained or operated for the purpose of producing revenue for such institution.”

Under a recent decision of our Supreme Court, in the case of the *City of Chicago v. University of Chicago*, 228 Ill., 605, the court held:

“Dormitories, dining halls and club houses located together upon a university campus and used for conducting the educational work of the university and not for gain or revenue, are within the meaning of an ordinance remitting water rates to all buildings used *immediately for educational purpose* notwithstanding the expense of maintaining such building is met in part by room rent, board, dues and tuition fees paid by students.”

The aforesaid section, as amended, further provides:

“The Commissioner of Public Works shall keep or cause to be kept accurate accounts against all institutions exempted from the payment of water rates and charges, and shall cause semi-annual water bills to be rendered in accordance with

such accounts on specially provided blanks, which, when certified by the Assessor of the Bureau of Water after duly authorized inspection of the premises indicated in such bills, shall be canceled by the Commissioner of Public Works, and a record of the amount so canceled shall be kept by the assessor in a book provided for that purpose. The accounts of the Department of Public Works shall show the amounts so canceled as a credit to the total collections and as a debit to the institution specified."

Also :

"The Commissioner of Public Works may require every applicant for a remission or cancellation of such water rates and charges against any such institution to be verified by the affidavit of two or more taxpayers of the city."

And under the ordinance with the qualification imposed by the Supreme Court in the case of the *City of Chicago et al. v. University of Chicago (supra)*, any property used for gain or profit or rented, conducted, maintained and operated for the purpose of producing revenue for any charitable, municipal, religious, or educational institution, should be assessed for water consumed. Where part of any premises are used in the immediate conduct of any institution and part for purpose of deriving revenue, it will be entirely proper for your department to put in separate taps or meters and to keep separate the accounts, so that the terms of the ordinance may be complied with.

The ordinance also provides :

"Nothing herein contained shall be held to exempt the Cook County Hospital or any other institution, building, structure, or premises owned or occupied by the County of Cook or used for its purposes, from the payment of water rates and charges for water supplied to it from the city water works system."

Yours very truly,

O. C. BRUHLMAN,
Assistant Corporation Counsel.

Approved :

GEORGE W. MILLER,
First Assistant Corporation Counsel.

JANUARY 22, 1908.

JOHN KJELLANDER, ESQ., City Sealer.

Dear Sir:

Your letter of January 16, addressed to the Corporation Counsel upon the above subject has, by his direction, been referred to me.

You state that various railway companies, having their termini in the City of Chicago, maintain scales at their team tracks, and there weigh produce which has been shipped over their own lines before it is delivered to the consignees, and also weigh, generally, loads of goods brought to them by the public, and that they charge a fee for such weighing and issue a certificate showing the weight of the goods weighed. You further state that these railway companies (with one exception) have not a city weigher's license under the terms and provisions of Chapter LXXIV of the Revised Municipal Code of Chicago of 1905.

Chapter LXXIV provides, among other things, that "The Mayor shall, from time to time, appoint so many and such persons to be city weighers as he may think proper and he may remove them." The chapter then provides that a bond must be furnished and scales provided by the various city weighers. It is also provided that all scales shall be inspected and sealed by the Inspector of Weights and Measures at least once in every three months; that records shall be kept of every load weighed and a certificate of weight issued. Compensation at the rate of ten cents for every load, or part of a load, is authorized. The ordinance further provides that:

"No person shall use or keep any scale in any public place, street or alley within the city, for weighing any substance or thing, for the public, except city weighers who shall have complied with all the provisions of this chapter, and who shall have been duly authorized by the City Council to install their scales in such public place, street or alley."

The power to enact the City Weighers' Ordinance is conferred upon the Common Council by Paragraphs 64, 55, 56 and 91 of Section 1 of Article V of the Cities and Villages Act, which are as follows:

“FIFTY-FOURTH.— To regulate the inspection, weighing and measuring of brick, lumber, fire-wood, coal, hay and any article of merchandise.

“FIFTY-FIFTH.— To provide for the inspection and sealing of weights and measures.

“FIFTY-SIXTH.— To enforce the keeping and use of proper weights and measures by vendors.

“NINETY-FIRST.— To tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery scales, *public scales*, money changers and brokers.”

It has been held that the power to regulate as conferred in Paragraph 54 does not give the city power itself to erect scales.

Savanna v. Robinson, 81 Ill. App., 471.

The city does have power, however, to make regulations under which owners of scales may become “public weighers,” and thereby become entitled to weigh for the public and receive the compensation fixed for such weighing for the public.

There is nothing in Chapter LXXIV which requires any owner of scales to become a city weigher unless (1) his scale is located in a public place, street or alley, and (2), being so located weighing is done for the public. If the owner keeps his scale on his own premises there is nothing to prevent him from weighing for other people and from charging a reasonable compensation or such compensation as may be expressly agreed upon between the weigher and the person whose goods have been weighed.

With reference to the weighing of grain there are provisions both in the Constitution and in the Statutes of Illinois. Section 4 of Article XIV of the Constitution provides:

“All railroad companies and other common carriers on railroads shall weigh or measure grain at points where it is shipped, and receipt for the full amount, and shall be responsible for the delivery of such amount to the owner or consignee thereof, at the place of destination.”

Section 1 of “An Act regulating the receiving, transportation and delivery of grain by railroad corporations, and defining the duties of such corporations with respect thereto,”

approved April 2, 1871, and in force July 1, 1871 (Hurd's Rev. Stat. of Illinois, 1905, p. 1586), provides in part as follows:

“WEIGHING IN — RECEIPT.— And at the time such grain is received by it for transportation, such corporation shall carefully and correctly weigh the same, and issue to the shipper thereof a receipt or bill of lading for such grain, in which shall be stated the true and correct weight.

“WEIGHING OUT — SHRINKAGE.— And such corporation shall weigh out and deliver to such shipper, his consignee, or other person entitled to receive the same, at the place of delivery, the full amount of such grain, without any deduction for leakage, shrinkage or other loss in the quantity of the same.

“DAMAGES.— In default of such delivery, the corporation so failing to deliver the full amount of such grain shall pay to the person entitled thereto the full market value of any such grain not delivered at the time and place when and where the same should have been delivered.”

It will thus be seen that there is imposed upon a railroad carrying grain an obligation to the consignee as well as the consignor to weigh the grain transported. Under these provisions of the statute as well as under the provisions of the common law relating to the business and governing the liability of common carriers, I am of the opinion, that if a railroad company confines itself to weighing upon its scales for consignees the grain and produce carried over its own line, it can not be said to be weighing for the public, and, hence, it is not violating Chapter LXXIV of the city ordinances.

Hoffman v. Jersey City, 34 N. J. L., 172.

When a railroad company weighs for the owners of grain or produce other than consignees of such grain or produce shipped over its own line, it must, if its scales are located in a public place, street or alley, secure a city weigher's license under the provisions of Chapter LXXIV.

To summarize: Where railroad scales are located upon a public place, street or alley, the railroad companies may not weigh for the public other than consignees of goods shipped over their lines without the license provided for in Chapter

LXXIV. If they do weigh for the public, other than consignees, without a license, they are guilty of a violation of Chapter LXXIV. If the scales are located upon their own premises they may then weigh both for consignees and for the public and charge for such weighing for the public.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

JANUARY 30, 1908.

PAUL P. BIRD, Esq., Smoke Inspector.

Dear Sir:

Your letter of January 28, addressed to the Corporation Counsel on the above subject, has been, by his direction, referred to me.

Where the owner of a building upon which a smoke stack is located permits his stack to be connected with the furnace of an adjacent building, I am of the opinion that the owner of the building upon which the stack is located is responsible for the dense smoke which is emitted from his stack:

Section 17 of the ordinance as amended, provides, among other things, that:

“Any person or persons, or corporation, owning, operating, or in charge or control of . . . any building or premises who shall cause or permit the emission of dense smoke within the city, . . . from the smoke stack or chimney of any building or premises so owned, controlled or in charge of him, her or them . . . shall be deemed guilty of a violation of this ordinance . . . ”

The ordinance by its terms plainly makes the owner or the one in charge or control of the building *upon which the stack is located* responsible for the emission of dense smoke. There is nothing in the ordinance which would seem to make the owner of a building, the furnace of which is connected with the stack on another building, responsible for the emission of dense smoke. If an owner of a building permits the

smoke stack on that building to be connected with the furnace in another building he must abide the consequences.

At the common law the rule is similar to the one laid down in the ordinance. An owner or occupier of a building (not having parted with the possession), who by a license authorizes the doing on his land of something whereby a nuisance is created, is liable. *White v. Jameson*, 18 L. R. Eq., 303; *Laughter v. Pointer*, 5 B. & C., 547. In the latter case the court said:

“The injuries done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others.”

The same general principle has also been laid down in *Attorney General v. Heatley* (1897), 1 Chancery, 560; *Gray v. Boston Gas Light Company*, 114 Mass., 149.

It is also a well settled principle of law that any person who contributes to the production of a nuisance may be made chargeable with the injury he inflicts, although others may have contributed thereto and his act alone would not constitute a nuisance, but the combined effect of the acts of himself and the others is sufficient to create a nuisance. *Wood on Nuisances*, 3d Ed., p. 1249. See also *Chicago-Virden Coal Co. v. Wilson*, 67 Ill. App., 443.

In view of the wording of the ordinance under which your department acts and in view of the general principles of law which I have stated above, in my opinion, the questions which you ask may be answered as follows:

1. You may bring a suit against the building upon which the stack is located, disregarding the fact that the stack is used by someone else.

2. Under the ordinance the owner of the building upon which the stack is located is responsible, even though the smoke generated in his furnace is not sufficient of itself to be considered dense smoke.

3. Where all the smoke is generated by the furnace which is located in one building, but which is connected with the

stack located upon another building, I am of the opinion that under the ordinance suit should be brought against the owner of the building upon which the stack is located.

If the two buildings are joined together in such a way that they might properly be considered one structure rather than two separate structures, it would be proper in all the cases which you put, to bring suit against both owners, but the buildings which you mention are not, as I understand the facts, united in such a way as properly to be considered a single structure.

Yours very truly,
EDWIN H. CASSELS,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

JANUARY 30, 1908.

JOSEPH Z. UHLIR, Esq., Chairman Sub-committee, Streets and Alleys West.

Dear Sir:

At the direction of the Corporation Counsel, I transmit to you the following report and opinion on the subject of the right to lay railroad tracks upon the streets in Greene's South Branch Addition to Chicago and in Greene's South Branch Addition Extended.

Greene's South Branch Addition to Chicago as originally laid out includes the territory between the South Branch of the Chicago river and Twenty-second street and extending from a line about 314 feet east of Joy's canal to the east line of Laffin street. This subdivision, therefore, includes streets now known as Loomis street, Throop street, South Center avenue, Fisk street and Morgan street between Twenty-second street and the South Branch of the Chicago river. It also includes such parts of Lumber street between the east and west limits of the subdivision as have not been vacated by the City Council.

The original plat of Greene's South Branch Addition was filed for record June 17, 1856, and recorded originally in

Book 98 of Maps, page 90. After the Chicago fire, a restoration of this plat was made by order of the Circuit Court of Cook County and the restored plat is recorded in Book 9 of Plats, page 72. This plat contained the following reservation "reserving the right to lay down and maintain one or more railroad tracks in each of the streets laid out in said addition, together with all necessary switches, turnouts and turntables."

Directly west of the land included in Greene's South Branch Addition is land subdivided by the plat of Greene's South Branch Addition Extended, a restoration of which was made by order of the Circuit Court of Cook County and recorded in Block 9 of Plats, page 71. This subdivision extended from the east line of Laffin street to the middle of what was then called Reuben street, the name of which was afterward changed to Ashland avenue, and extended from Twenty-second street to the South Branch of the Chicago river. By this plat all of Laffin street and the east half of Ashland avenue between the South Branch of the Chicago river and Twenty-second street is dedicated to public use. No reservation of the right to lay railroad tracks was made in the plat of Greene's South Branch Addition Extended.

By an ordinance duly passed by the City Council March 18, 1878, a portion of Lumber street immediately east of Loomis street was vacated and thereafter a portion of the land included in Greene's South Branch Addition was resubdivided, the resubdivision being entitled a "Resubdivision of lots 172-4, both inclusive, and 11-19, both inclusive, together with that part of Lumber street between Sampson's and Stetson's canals and the street between lots 12 and 13, all in Greene's South Branch Addition to Chicago." Loomis street, which in the original subdivision extended only to Lumber street, was in the resubdivision extended in a straight line through to the South Branch of the Chicago river. The plat of the resubdivision contains no reservation of the right to lay and maintain railroad tracks on that part of Loomis street between Lumber street, as it theretofore existed, and the South Branch of the Chicago river.

The reservation in the original plat of Greene's South Branch Addition made the dedication of the streets shown

thereon and dedicated thereby a conditional dedication. The law seems to be well settled that in dedicating land for public use as a street the dedicator may impose such reasonable conditions, limitations and restrictions as he may see fit. When the municipality accepts the dedication it is accepted subject to the limitations, restrictions and burdens imposed by the conditions or reservations expressed in the dedication.

Cyc., Vol. 13, p. 459.

Am. & Eng. Ency. Law, 2d Ed., Vol. 9, p. 75.

Elliott on Roads and Streets, 2d Ed., Par. 148.

Dillon on Municipal Corporations, 4th Ed., par. 629.

Tiffany on Real Property, par. 421, p. 973.

Mercer v. Woodgate, L. R. 5, Q. B. 26.

Stafford v. Coyney, 7 B. & C., 257.

Huff v. Hastings Express Co., 195 Ill., 257.

Princeton v. Templeton, 77 Ill., 68.

Conkling v. Springfield, 39 Ill., 68.

Cohoes v. Delaware, etc., Canal Co., 134 N. Y., 397.

Pettibone v. Hamilton, 40 Wis., 402.

Such condition, limitation or reservation, however, must not defeat the public rights in the street or deprive the municipality of police power over the street. If the condition, limitation or reservation would operate to defeat the public rights in the street or to deprive the municipality of police power, the dedication will stand and the reservation will fail.

Elliott on Roads and Streets, 2d Ed., par. 148:

State v. Spokane, etc., R. Co., 19 Wash., 518.

City of Noblesville v. Lake Erie, etc., Ry. Co., 130 Ind., 1.

Reservations similar to the one made in the plat of Greene's South Branch Addition of the right to lay and maintain railway tracks have been passed upon and their validity upheld by the courts in the following cases:

Ayres v. Pennsylvania Ry. Co., 48 N. J. L., 44.

Tallon v. Hoboken, 59 N. J. L., 383.

City of Noblesville v. Lake Erie, etc., Ry. Co., 130 Ind., 1.

Ottawa, etc., Ry. Co. v. Larson, 40 Kan., 301.

Brunswick, etc., Ry. Co. v. Waycross, 91 Ga., 573.

And it has also been held by the Supreme Court of Indiana that the right reserved need not be exercised at once, or

within a limited time after the dedication is made; the right is a continuing one.

City of Noblesville v. Lake Erie, etc., Ry. Co., 130 Ind., 1.

In making the foregoing statement of the law applicable to reservations of the kind made in the plat of Greene's South Branch Addition, I am not unmindful of the fact that the Supreme Court of Illinois, following a decision of the Supreme Court of Georgia, has held that where a municipality *grants* to a railroad company the privilege to lay one or more tracks upon or across a street, the privilege mentioned must be exercised within a reasonable time. If within a reasonable time but one track is constructed, the grant will be held to have been exhausted by such construction.

Savannah R. R. Co. v. Woodruff, 86 Geo., 94.

Chicago Terminal Railway Co. v. Chicago, 220 Ill., 310.

The reservation in Greene's South Branch Addition, however, is not a case of a *grant* by the city of a right to lay tracks in the public street, but a case of such right reserved by the owner of the land when the street was dedicated. In such a case where the reservation will not deprive the public of its use of the street and will not operate to take away from the municipality its police power, the city does not secure by the dedication complete title to and entire dominion over the street. The city never having gained complete title to and dominion over the street it follows that the right reserved is not exhausted by the original construction of railroad tracks.

City of Noblesville v. Lake Erie & N. Ry. Co., 131 Ind., 1 (cited above).

As to the streets dedicated by the plat of Greene's South Branch Addition Extended and by the resubdivision of lots 172-4, and other land hereinbefore mentioned, there was no reservation. The dedication was absolute, and the owners of the land abutting such streets have no right to lay railroad tracks unless such right is granted by the City Council in the usual way, that is by ordinance duly passed for that purpose.

Chicago Terminal Railway Co. v. Chicago, 220 Ill., 310.

Tudor v. The Rapid Transit Railway, 154 Ill., 129.

I am unable to find any ordinances of the City Council authorizing the laying of railroad tracks within the limits of

the territory covered by these various subdivisions except upon a portion of Lumber street. Ordinances have been passed granting to the Chicago, Burlington & Quincy Railroad Company the right to lay tracks upon Twenty-second street. I find no ordinance granting the right to lay tracks upon Laflin street or upon Loomis street.

The Superintendent of Streets reports that railroad tracks are upon Morgan street, Fisk street, Center avenue, Throop street, Loomis street and Laflin street. For the laying of all of these tracks, except those laid upon Laflin street and upon that part of Loomis street between Lumber street, as it formerly existed, and the South Branch of the Chicago river (the 400 feet of the street north of the river, more or less), authority is given, in my opinion, by the reservation made in the plat of Greene's South Branch Addition, providing such tracks were laid by or for the owners of the real estate abutting upon said streets. I am advised by counsel for the Chicago, Burlington & Quincy Railroad Company, that all tracks laid in this subdivision, were laid for the owners of the real estate. For the laying of that portion of the tracks in Loomis street south of the south line of Lumber street, as it formerly existed, and for the tracks in Laflin street, I find no authority whatever.

On the question of the right of the owners of abutting real estate to lay additional tracks on the streets included within the reservation made in the plat of Greene's South Branch Addition, I am of the opinion that such owners have the right to lay such additional tracks, provided, as a matter of fact, the laying of such additional tracks will not deprive the public of its use of the streets on which tracks are proposed to be laid. If at any time the laying of an additional track or tracks would deprive the public of its use of the street, permission for the laying of the same should not be granted.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,

First Assistant Corporation Counsel.

JANUARY 30, 1908.

L. E. GOSSELIN, Esq., Deputy Comptroller.

Dear Sir:

Your letter of January 21, addressed to the Corporation Counsel, has by his direction been referred to me.

You state that John A. Ploner, formerly City Oil Inspector, has failed, after demand has been made upon him, to account for and to pay to the city the fees in excess of his salary and the expenses of his office collected by him during the last months of his term.

On December 9, 1907, I addressed a letter to you in which I called your attention to the decision of the Supreme Court of Illinois in the case of the *City of Chicago v. Burke*, 226 Ill., 191, in which it was held that the ordinance under which Mr. Ploner was appointed Oil Inspector was in contravention of Chapter 104 of the Illinois Statutes, and was, therefore, void. It was also held by the Supreme Court in that case that the person appointed as Oil Inspector under that ordinance was not even a *de facto* officer of the city. It follows, therefore, that the contract entered into with Mr. Ploner in pursuance of the terms of the ordinance also was void.

In my letter of December 9, 1907, I advised you that in view of the decision in the Burke case the city's right to recover the excess fees in question was extremely doubtful. However, I advised you that, because of the fact that the contract had been signed by Mr. Ploner, he might be considered in honor and good faith bound to pay the excess fees to the city. I therefore advised you to make a demand upon Mr. Ploner for these fees, and, in case he refused, to report the refusal to this office.

After a careful consideration of the opinion rendered by the Supreme Court in the Burke case, I am of the opinion that, because of the fact that the ordinance and the contract were both wholly void, the city can not recover from Mr. Ploner in an action at law the excess fees which he has failed to pay to the city. If suit were to be instituted to recover these fees the city would have to rely upon the contract, and inasmuch as his contract falls with the ordinance and is wholly void, the city could not prove its case. If the contract had been within

the general scope of the city's power to contract, and if it had been invalid because of some irregularity in its execution, then a different question would have been presented. In that case Mr. Ploner, having acted under the contract, might be estopped from denying its invalidity, but, in view of the decision in the Burke case, no such question is presented, because the contract was wholly without the city's power.

Since the appointment of Mr. Ploner was wholly without authority of law, he had no legal right to collect fees for inspection of oils, but having rendered the services and collected the fees, he can not be compelled to pay back the money to those for whom the services were rendered. Likewise, he can not recover any excess fees which he may have paid into the city treasury. In other words, his appointment and his actions under his appointment being all illegal, the law leaves the money collected where it finds it; and this applies to the city as well as to Mr. Ploner.

Since writing my former opinion (December 9, 1907), I have been advised that during the latter part of the year 1907, and before the decision in the Burke case, the Finance Committee of the City Council had under consideration the matter of increasing the salary of the Oil Inspector to \$5,000.00 a year. While no definite action was taken, it seems that the committee favored recommending such an increase. After the handing down of the decision in the Burke case the committee dropped the matter.

I am advised, further, that it was not only the intention of the Finance Committee to recommend the increase in the salary of the Oil Inspector, but it was also the intention of the committee to make such increase date from January 1, 1907, and that it had been suggested to Mr. Ploner that he retain from the excess fees collected after the month of January an amount sufficient to make his salary equal to \$5,000.00 a year, beginning January 1, 1907.

I state these facts, which were not known to me at the date of writing my former opinion, for the purpose of showing Mr. Ploner's justification (if any) for retaining the excess fees, or at least a part of them. The negotiations with the Finance Committee, of course, have no bearing on the legal

questions involved here, but they may (and in my opinion they do) affect somewhat the moral aspect of the case.

I may add that after a careful consideration of the decision in the Burke case, Assistant Corporation Counsel Barge, who drew the ordinance fixing the amount of the bond of the present Oil Inspector, concurs with me in this opinion.

Because of the fact that the city can not recover at law from Mr. Ploner the excess fees which he collected during the last three months of his term, I am of the opinion that the claim should be stricken from the list of the city's assets.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

FEBRUARY 7, 1908.

TO THE COMMITTEE ON GAS, OIL AND ELECTRIC LIGHT, OF THE
CITY COUNCIL.

Gentlemen:

Some time prior to October 23, last, your committee submitted to this department eight questions relative to the rights and privileges of the Chicago Edison Company and the Commonwealth Electric Company, which I answered in an opinion under that date.

At the time these questions were submitted I was directed by your committee to take up for consideration with the general counsel of these two companies, and together with him, prepare an ordinance for the regulation of rates and charges for electric light service.

At that time there was in contemplation a consolidation between these two companies. Since then, as you have been heretofore advised, this consolidation has been effected under the name of Commonwealth Edison Company. Numerous conferences have been held between the general counsel of these companies and myself, with the result that I here transmit to you the enclosed draft of an ordinance, which, as I understand it, is satisfactory both in form and substance to

the company, and which I submit with the following comments and suggestions:

1. The first section is devoted quite exclusively to the question of rates and prescribes maximum rates. By the terms of this section the Commonwealth Edison Company may not charge for supplying a customer with electricity to an extent not exceeding the equivalent of thirty hours' use per month of the customer's maximum requirements more than fifteen cents a kilowatt hour during the first year following the acceptance of this ordinance, nor more than thirteen cents a kilowatt hour thereafter.

For supplying a customer in excess of the equivalent of thirty hours per month of maximum requirement, the gross rate, or secondary rate, to distinguish it from the full or primary rate, shall not be more than nine cents during the first year, nor more than eight cents during the second, nor more than seven cents during the last three of the period of five years covered by the ordinance.

The consumer's maximum requirements are to be determined by meter measurement, if so desired by the consumer, and he shall have the equivalent of at least twenty-five 50-watt incandescent lamps connected for taking electricity; otherwise, it may be fixed by agreement or by the estimated average maximum load, as shown by the experience of the company in the same class of service.

All gross rates, both primary and secondary, are to be subject to a discount equal to one cent a kilowatt hour where bills are paid at the proper office within ten days from its date. These rates are suggested by the representative of the company. I have no means of knowing whether they are reasonable or otherwise, and express no opinion thereon. This is a question for your committee, and as such it is submitted to you.

By the terms of this section the foregoing rates are limited to the "usual and regular supplying of electricity" and will not compel the adoption by the company of only the meter system, therein referred to, of charging, nor will the ordinance prevent the company from agreeing upon different methods of charging in cases where electricity shall be supplied in

specially large quantities or upon a guaranty of some specified consumption, or under other special circumstances or conditions; nor will the rates fixed apply where electricity shall be supplied merely for occasional or emergency use, such, for example, as once a week, or during the temporary breakdown of a private plant.

It will be seen, as I have stated, that under the terms of this ordinance, the maximum rates prescribed are limited to the usual and regular supplying of electricity. These other provisions to which I have just directed your attention are insisted upon by the representative of the company as necessary by reason of the character of and the conditions under which the business of the company must be carried on. They present questions of policy, to be determined by your committee primarily, and ultimately by the Council, subject to approval or disapproval by the Mayor, rather than questions of law, and as such I direct your attention to them and submit them to you.

For supplying electricity either by overhead or underground construction to the city for street arc lighting the rate to be charged shall not exceed seventy-five dollars a year for each arc lamp from dusk to daylight, with an illuminating value equivalent to that of the open type of arc light now used by the city, when such open type arc lamp is consuming not to exceed 450 watts, and for this price annually the company is required to supply any and all electricity which the city may require for such street arc lamps.

This section also provides that the rates to be charged for supplying electricity "shall be reasonable, and there shall be no unlawful or unjust discrimination in such rates and all customers of said company shall be allowed like rates under like circumstances and conditions." This provision as to discrimination is suggested by the representative of the company as a concession to the city. If I correctly understand his position, it is his view that under the common law a public-service corporation has the right to discriminate between its customers in the rates charged, and this may be done subject only to the limitation that no customer can be charged an unreasonable rate for the service furnished him. In other

words, it is his view that the law does not require the discrimination to rest upon some reasonable basis, but that it may be an arbitrary one. If this is to be the correct view of the law, this provision, in so far as it prevents unjust discrimination, and requires all customers "under like circumstances and conditions" to be allowed like rates, is a concession by the company.

However, in my opinion addressed to your committee under date of October 23, last, I said (on page 23): "It is thought that the current of authorities will establish, and that our own courts will hold, that this common law right to discriminate is subject to the limitation that the discrimination must not be *arbitrary* or *unjust*, but must rest upon some reasonable basis."

This paragraph expresses my view of the law, and, if I am right in the view I entertain, the provision of the ordinance here submitted relating to discrimination is but a statement of the common law, and neither adds to the rights of the city, nor takes from the rights of the company. I do not regard it of any consequence whether the provision is in the ordinance or out of it, for, as I have already indicated, it is my view that where a public service corporation discriminates in rates, that discrimination can not be arbitrary nor unjust, but must rest "upon some reasonable basis."

2. The second section may be termed the Release and Waiver Section. By the terms of this section the Commonwealth Edison Company, upon the acceptance of this ordinance, surrenders and waives all rights, privileges and benefits which, after the date of such acceptance, might accrue to it under any special ordinance or ordinances of the city or any other municipality granted to either the Chicago Edison Company or the Commonwealth Electric Company, or secured by either of those companies by assignment or transfer, except the ordinance of March 28, 1887, to the Western Edison Light Company, under which the Chicago Edison Company has been operating, and the ordinance of June 28, 1897, to the Commonwealth Electric Company.

It will be noted that this section, as drawn, surrenders and waives rights, privileges and benefits which may accrue after

the date of acceptance. So far as these two companies now consolidated have exercised rights and privileges under ordinances to which the waiver applies, as, for instance, by erecting poles, laying conduits, etc., the benefits of the rights and privileges so exercised are retained, but this section is a surrender by the company of the right or privilege of erecting further poles or laying further and additional conduits, etc., under such ordinances.

Section 2 also provides that the continuing ordinances above referred to shall have force and effect throughout the entire territory of the city as now existing and as hereafter at any time or times extended by annexation or otherwise. This provision is suggested by the company. I do not regard it of any special value to the company, nor is it of any disadvantage to the city, for it is a mere statement of the law as it now exists. It is clearly established by the decisions of our own Supreme Court, as well as by the decisions of respectable courts elsewhere, that upon annexation the ordinances of a city spread generally of their own force over the annexed territory. Such I understand to be the ruling of our Supreme Court in the Chicago Telephone Company case, 220 Ill., 238.

This section also expressly provides that nothing contained in the ordinance submitted shall be understood to operate in any way directly or indirectly to extend or keep in force either the ordinance of March 28, 1887, which expires March 28, 1912, or the ordinance of June 28, 1897, which expires in 1947, beyond the times respectively provided in them for their termination.

3. Section 3 relates to compensation and requires payment annually to the city of an amount equal to three per cent of the gross receipts from all the plants which the Commonwealth Edison Company may from time to time operate in the city after this ordinance takes effect. This will include the consolidated business of the Edison and the Commonwealth Electric Companies. Payment under this ordinance is to be made in the same manner and under the same conditions as to time of payment, filing statements, examination of books, etc., as is provided in regard to the payment of compensation under

the ordinance of June 28, 1897, to the Commonwealth Electric Company.

This section further provides that gross receipts which may be derived by the Commonwealth Edison Company from the sale and distribution within the city of electricity purchased by it from any other company or companies, either within or without said city, shall be considered a part of the company's gross receipts upon which the percentage is to be paid to the city. While this ordinance contains no direct provision assuming either to prohibit or authorize the purchase of electricity from other companies, the provision to which attention has just been directed is a recognition of the fact, if not the right, of the company to make such purchases, and as such I direct the attention of the committee to it.

Section 3 also contains a recognition of the right of these companies, now consolidated under the name of Commonwealth Edison Company, to mortgage the rights and privileges granted by the ordinances under which they have heretofore operated, and of a purchaser at a foreclosure sale under such mortgage to take and enjoy such rights and privileges. The section also contains a recognition of the right of the Edison Company and of the Commonwealth Electric Company to consolidate. These provisions are inserted at the request of the representative of the company for reasons which he can explain to you.

I have already advised you, in the opinion of date October 23, last, that these two companies now consolidated have the right, under the ordinances of March 28, 1887, and of June 28, 1897, and under the statutes of this State relating to corporations, to mortgage their so-called franchise rights, and that a purchaser at a foreclosure sale under such a mortgage will take and have the right to enjoy the rights and privileges granted by such ordinances. I have also advised you that the two companies have the right to consolidate. I therefore regard it as immaterial, so far as the rights of the city are concerned, whether this ordinance contains a recognition of the right to mortgage, or not. As to the consolidation of these two companies, if the consolidation has been effected in the manner provided by statute — and as to that I have made

no examination — I make the same comment I have just made concerning the recognition in the ordinance submitted of the right to mortgage.

4. Section 4 of the ordinance submitted amends Section 3 of the ordinance of June 28, 1897, in the following particulars: In the third line of Section 3 as amended the word "place" is inserted before the word "wires," so that it will read, "erect a system of poles and place wires, conductors," etc.

By the terms of Section 3 of the ordinance of June 28, 1897, the city is entitled to the use of the top cross-arm of each of the company's poles, free of charge. I am advised by the City Electrician that, as a matter of fact, the *top* cross-arm is seldom used, but that by arrangement with the company a cross-arm agreed upon is used instead. At the suggestion of the City Electrician, therefore, the word "top" has been stricken out, and the words "use of one" inserted, so that it will read, "shall have the right to the use of one cross-arm," etc. By the terms of Section 3, also, the poles required to be erected by the company were limited to cedar poles. This limitation as to the kind of poles has been removed by striking out the words, "cedar poles."

Further on in the section the words "branch offices" have been replaced by the word "sub-stations." In a later portion of the section the words "grouped in" have been replaced by the words "conductors and," so that the language "may in so doing cross streets, alleys, sidewalks and city property with its wires grouped in cables" has been changed to "with its wires, conductors and cables."

5. Section 5 of the ordinance submitted amends Section 6 of the ordinance of June 28, 1897, by rewriting the same. There are two essential features of this Section 6 as rewritten. The section is strengthened in its requirement that conductors, wires and cables shall at the time of installation be installed and insulated in accordance with the best or most approved methods then in general use, and that the City Electrician shall have authority to direct and require said company to adopt any methods in such installation and insulation of overhead conductors, wires and cables necessary for the due protection of the public.

The other feature to be noticed is the omission from Section 6, as rewritten, of the requirement that all overhead conductors used by the company shall be protected by guard wires or other suitable mechanical device or devices.

I have noted in my investigation that this requirement of guard wires, etc., was omitted from the ordinance passed by the City Council and vetoed by Mayor Dunne. I am advised, also, that from a practical point of view these guard wires have never been used and can not be successfully used. I may say, also, that this section has been submitted to the City Electrician, and has his approval. I therefore direct your attention to these essential features in the section as rewritten, and thus submit them.

6. Section 6 permits the company, until otherwise required by the city, to maintain and use the overhead electric wires which it now has between Thirty-ninth street on the north, Fifty-fifth street on the south, Armour avenue on the west and Lake Michigan on the east, constructed there under authority of ordinances granted by the Village of Hyde Park and the Town of Lake, but expressly provides that this overground construction shall be removed from any street or streets, alley or alleys, or other public places, whenever so ordered by the city.

7. Section 7 leaves unaffected by anything in this ordinance such rights and powers as the city now has or may hereafter acquire to provide by proper and reasonable general ordinances for the use, the regulation and inspection of electric meters and other electric apparatus, and for the reasonable regulation of the quality of electric service and for imposing proper and reasonable license fees, etc. The company does not agree, by the terms of this ordinance, that there is such a right or power in the city, but leaves that question unaffected.

This section also provides that nothing contained in this ordinance shall in any future regulation of rates be construed by the city as an admission that the maximum rates herein prescribed are reasonable or proper.

The right of the city to examine the books of the company, as contained in the ordinance of June 28, 1897, is in no wise affected by any of the provisions of this ordinance, but such

right is not broadened or increased. That right, according to the language of Section 10 of the ordinance of June 28, 1897, is to "examine the books of said company showing such gross receipts," etc. As long as the compensation to be paid the city is based upon the company's gross receipts, the right to investigate the question of its gross receipts sufficiently protects the city, so far as the compensation feature is concerned, because in this connection alone the city is not concerned with disbursements, but if the city should hereafter undertake by a police ordinance to regulate the rates, and this regulation should meet with the opposition of the company, it would be desirable to have a greater degree of access to the books and records of the company, for the purpose of determining what would be a reasonable rate, than the provisions of the ordinance of June 28, 1897, afford.

I have urged upon the representative of the Commonwealth Edison Company that there should be included in this ordinance additional provisions sufficiently broad and comprehensive to afford the city the right to a full and complete examination of the company's books and records in case such examination might hereafter be desired, but he has declined to consent to the insertion in the ordinance of such provisions.

I, therefore, direct your attention to this phase of the matter under consideration and submit the ordinance without such additional provisions.

This section contains in its last paragraph the express provision that at no time after the expiration of the period of five years provided for in the ordinance submitted shall the rates to be charged for the usual and regular supplying of electricity exceed the rates therein prescribed. This is in effect a contract between the Commonwealth Edison Company and the City of Chicago that after the expiration of the period of five years covered by this ordinance the rates to be charged by that company for the usual and regular supplying of electricity shall never be higher than the rates prescribed for the last year of the period stated.

8. At the suggestion of Alderman Snow, made by him as Chairman of the Subcommittee having the matter under advisement, there has been inserted in this ordinance a section

relating to certain conduits controlled and used by the Chicago Sectional Electric Underground Company.

Under date of July 31, 1882, the City of Chicago passed an ordinance in favor of Henry Corwith and others, their successors and assigns, which was thereafter amended by an ordinance passed by the City Council on December 9, 1885, both of which expired July 31, 1907. The Chicago Sectional Electric Underground Company succeeded to all the rights and privileges under this ordinance of July 31, as amended by the ordinance of December 9. Under this ordinance certain conduits were laid in certain of the city's public streets, etc., and these conduits, this department is advised, are now being occupied by certain tenants who pay rental therefor.

It is contemplated that the Commonwealth Edison Company shall acquire and take over these conduits and there has, therefore, been inserted a section (numbered 8) providing that if the Commonwealth Edison Company acquires and takes over these conduits it may permit the space in said conduits now occupied by other parties, under leases from the Chicago Sectional Electric Underground Company, to be so occupied until otherwise ordered by the city, and that in consideration of this privilege the Commonwealth Edison Company shall pay annually to the city a sum equal to ten per cent of its gross rentals or revenues from such space instead of three per cent required under other provisions of the ordinance, and that said ten per cent shall date from August 1, last, and payment be made in the same manner and under the same conditions, etc., as is provided in respect to the three per cent.

This section also provides that the city shall continue to have, free of charge, the use of the portions of the conduits referred to therein which are now occupied by it.

A consideration of the ordinance here submitted in the main involves questions to be determined by the legislative branch of the city government and not by the Law Department. As such I have endeavored to direct your attention to them and to submit them for consideration. If the provisions of this ordinance as to its subject matter meets the approval of your committee and of the Council, I regard the rights of

the city sufficiently safeguarded by the phraseology of the ordinance.

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

FEBRUARY 19, 1908.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

We are in receipt of your favor of February 18, requesting our opinion on the question whether persons and firms in the city engaged in brewing weiss beer, ale and porter and selling the same to their customers, as stated in the attached report of officer Thomas J. Ryan of the Thirty-eighth Precinct, are amenable to any city ordinance requiring them to procure a license for carrying on such business.

Article II of Chapter XXXVI of the Revised Code of 1905 is in part as follows:

“1355. No person or corporation shall carry on the business of a *brewer* or distiller within the city without having first obtained a license for such business, as hereinafter provided, for each *brewery* and each distillery conducted by such person or corporation, . . .

“1356. Upon compliance with the foregoing section and payment to the city collector of an annual license fee of five hundred dollars, or, if application be made after the month of May of any year, then upon payment of a sum bearing the same ratio to the sum required for the whole year as the remaining number of months of the term for which the license is granted (inclusive of the month in which application is made) bears to the whole number of months in the year, any such applicant shall be entitled to a license, signed by the mayor and attested by the city clerk, to carry on so much of the business of a brewer or distiller within the city as may be stated in the application therefor.”

The word “brewery” is defined in the Century Dictionary as a place where brewing is carried on, brewing being “the act or process of preparing liquors from malt or hops.” The

Statutes of the United States (U. S. Comp. St. 1901, p. 296) define a brewer as "a person who makes fermented liquor, of any name or description, for sale from malt wholly or in part or from any substitute therefor," and in case of *United States v. Dooley*, 25 Fed. Cas., 890, it was held that the above definition comprehended the making of every kind of malt liquor.

Ale is defined as "a light colored beer, made from malt which is dried at a low heat," and porter as "a dark brown malt liquor of English origin." (See *Century Dictionary*.) Weiss beer is also unquestionably a malt liquor, being described in *Leach's Food Inspection and Analysis*, which is relied upon for reference by the Department of Health, as "a beer prepared by the quick or top fermentation of a wort consisting of a mixture of malt, barley and wheat with hops."

It would seem, therefore, that ale, porter and weiss beer are all malt liquors and that any establishment engaged in their manufacture is a brewery within the meaning of the ordinance quoted.

The per cent of alcohol in weiss beer is not high, being, as we are advised, about two and three-fourths per cent as compared with about four per cent for lager beer and about four and three-fourths per cent for ale and porter, so that it may be urged that weiss beer is not intoxicating and that brewers of this beer are not, therefore, subject to the requirement for a license. In view, however, of the charter power of the city to regulate the sale of "any intoxicating, malt, vinous, mixed or fermented liquor" (Rev. Stat. 1905, Ch. 24, Sec. 62, 46th), and the language of Section 1355 of the Code as above, the test of the application of this ordinance is not whether the liquor is intoxicating but whether it can fairly be said to be malt liquor. As is said in *Hewitt v. The People*, 186 Ill., 336, p. 341, with reference to a prosecution for violation of the Dramshop Act which prohibits the sale of spirituous and vinous or *malt* liquor in quantities of less than one gallon with a license,

"The legislature defined a dramshop and selected spirituous, vinous and malt liquors and branded them as intoxicating without proof of their intoxicating character. (Sec. 1.)

Under the statute it is sufficient to prove that the

defendant sold spirituous, vinous or malt liquor without proving their intoxicating quality.”

With reference to the liability of the parties mentioned in the report of Officer Ryan to take out a wholesale malt liquor dealer's license, I would call your attention to Section 1359 of the Code as follows:

“1359. No person or corporation shall, within the city, sell, or offer for sale, any malt liquor in quantities of one gallon or more, at a time, without having first obtained, as hereinafter provided, a license so to do for each place of business where such malt liquor shall be sold or offered for sale, or for all wagons run for the purpose of such selling or offering for sale without any fixed place of business therefor. *But no brewer who has taken out a license, as such, from the city, and who sells only malt liquor of his own production, shall be required to obtain the license herein prescribed, on account of such sales.*”

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

FEBRUARY 24, 1908.

WILLIAM E. DEVER, ESQ., Chairman Judiciary Committee.

Dear Sir:

On January 27, last, there was referred to your committee by the City Council an order directing the Corporation Counsel to prepare an ordinance prohibiting the use of chains on the tires of automobiles operated in the City of Chicago, which order was afterward referred to this department.

In making an investigation of the law relating to the power of the City Council to pass this ordinance, preparatory to drafting same, I found that the Legislature of this State, on May 28, last, passed an act defining motor vehicles and providing uniform rules regulating the use and speed thereof,

and repealing all other acts or parts of acts contrary to or inconsistent therewith. Session Laws of 1907, page 510.

This act is very comprehensive, containing twenty-one distinct sections and taken together fully covers the subject of the use of motor vehicles and the power of the City Council to legislate in reference thereto.

From a careful reading of the act, I note that among other things it provides for the registration by owners within this State and by chauffeurs for numbers and lamps to be displayed thereon, for breaks and signals, and fixes the speed in different localities. It prohibits the use of fictitious numbers and racing upon public highways, and provides penalties for violations of the various sections of the act.

Section 13 of the act provides:

"No owner of a motor vehicle who shall have obtained a certificate from the Secretary of State as hereinbefore provided shall . . . be required to comply with other provisions or conditions as to the use of said motor vehicle except as in this act provided: . . . except as in this section provided, no city, town or village or other municipality, shall have power to make any ordinance, by-laws or resolution limiting or restricting the use or speed of motor vehicles, and no ordinance, by-law or resolution heretofore or hereafter made by any city, village or town or other municipal corporation within the State by whatever name known or designated, *in respect to or limiting the use or speed of motor vehicles* shall have any force, effect or validity and they are hereby declared to be of no validity or effect: Provided, that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor vehicles which are used within their limits *for public hire*."

Section 20 defines public highways and local authorities as:

"Public highways shall include any highway, county road, State road, public street, avenue, alley, park, parkway, driveway or public place in any county, city, village, incorporated town or towns. Local authorities shall include all officers of counties, cities, villages, incorporated towns, towns or road

districts, as well as all boards, committees and other public officials of such counties, cities, villages, incorporated towns, towns or road districts.”

There is no doubt the object in passing this act was to establish uniformity throughout the State and to divest cities, towns and villages and other municipalities of the power to legislate in regard thereto except as stated in the proviso to Section 13 above quoted, viz., motor vehicles used for public hire.

While it is true that no provisions are made in the act regarding the use of chains or of other devices used upon the tires of the wheels of automobiles, which it is said are destructive to the streets in the city, that fact does not authorize the City Council to pass laws to remedy the evil, if it is an evil, where the State undertook to legislate upon the same subject.

The Supreme Court of this State in the case of *City of Chicago v. Phoenix Insurance Co.*, 126 Ill., p. 726, said:

“If it should be conceded that the passage of the ordinance was authorized by the section of the City and Village Act, as that act was originally framed, the Legislature had the undoubted right, at such time as it saw proper, to divest cities, towns and villages of the power, and resume the exercise of the power itself. . . . If, therefore, the City of Chicago ever had the power to pass the ordinance under the police power conferred by the Cities and Villages Act, that power was taken away by the act of 1879,—it was divested by a later act.”

In the case of *Wilkie v. City of Chicago*, 188 Ill., 452, the court said:

“If the city ever had power to exact a license fee of \$30 for the regulation of the business of plumbing, that power was taken away by the above law, which went into force July 1, 1897. The power to regulate such a business and to grant a license therefor resides in the Legislature, which may grant a license directly or confer the right upon a city. While the Legislature may delegate the power to municipalities to . . . they may, at any time, take away such power or resume the exercise of it themselves. The Legislature may

repeal or amend any provision of the act for the incorporation of cities and villages at their pleasure, and if the provisions . . . are inconsistent with the power claimed by the city, they will operate as a repeal or amendment of the charter to that extent."

To the same effect see *City of Chicago v. Burke*, 226 Ill., 204.

The general rule laid down in the above authorities is applicable to the proposed ordinance, and in addition to that, Section 13 above quoted, in language that can not be misunderstood, directly prohibited the City Council from passing any law *in respect to or limiting the use of motor vehicles* except such as are used for public hire.

The streets of Chicago are public highways as defined by Section 20.

I am of the opinion that if the city ever had the power to pass an ordinance prohibiting the use of chains or other non-skidding devices, upon the tires of motor vehicles (a question on which I do not find it necessary for me to pass upon at this time), it was divested of that power by the act of the Legislature above referred to.

I, therefore, respectfully return the order for your further consideration and direction.

Yours very truly,

JOHN J. BEILMAN,
Assistant Corporation Counsel.

Approved:

GEORGE W. MILLER,
First Assistant Corporation Counsel.

FEBRUARY 24, 1908. .

JACOB A. HEY, Esq., Alderman, Twenty-third Ward.

Dear Sir:

Under recent date you submitted to this department the following question, which I now proceed to answer:

"Under what authority is the Western Union Telegraph Company permitted to occupy the public streets of Chicago?"

In 1866 (July 24) Congress passed an act, the first section of which provides in part as follows:

“Be it enacted,” etc., “that any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or *may hereafter* be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States.”

Section 4 of this act provided that before any telegraph company should exercise any of the powers or privileges conferred thereby, such company should file its written acceptance with the Postmaster-General of the restrictions and obligations required by that act.

In *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S., 1, this act was sustained by the Federal Supreme Court as an exercise of power in Congress, under the Constitution, to regulate commerce with foreign nations and among the several States, and to establish post-offices and post roads; and it was held that the grant contained in this act extends to the public domain, the military and post roads and the navigable waters of the United States.

By an act of March 1, 1884, Congress provided that “all public roads and highways, while kept up and maintained as such, are hereby declared to be post roads.” By these two acts Congress, in the exercise of its constitutional power to regulate and control interstate commerce — and the business of a telegraph company has been held to be interstate commerce — has provided that all telegraph companies accepting the provisions of the act, in manner therein provided, may construct, maintain and operate lines of telegraph over and along any post road, and has made post roads of all public roads and highways, while kept up and maintained as such.

This company has availed itself of the privileges and benefits of the Act of 1866, and it is under the permission found in that act, coupled with the Act of 1884, which makes our public streets post roads, that the company has erected and is now maintaining its poles with wires thereon in our public streets.

It has been held, however, that the Act of 1866 is permissive in its character; and that while a State can not prohibit absolutely a telegraph company under the Act of 1866 from occupying post roads, the company yet owed obedience to the laws of the State into which it entered, and its right to occupy public streets, highways, etc., was subject to reasonable regulations.

Western Union Telegraph Co. v Massachusetts, 125 U. S., 530.

In *St. Louis v. Western Union Telegraph Co.*, 148 U. S., 92, the court sustained the validity of an ordinance requiring this company to pay five dollars per annum for each and every telegraph pole erected or used by them in the streets, alleys and public places in that city as compensation therefor. The court said in that case (page 100):

“It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of the State. It is like any other public franchise, to be exercised in subordination to public as to private rights.”

In *City of Toledo v. Western Union Telegraph Co.*, 107 Fed. Rep., 10 (United States Circuit Court of Appeals for the Sixth Circuit), the court, speaking of the right of this company to erect poles and string wires thereon in the public streets of Toledo without a permit therefor, said:

“We think, however, in the use of these streets and alleys, although it had accepted the terms of the statute of 1866, the complainant (company) was subject to the control of the municipality and could not, in defiance of its reasonable regulations, erect poles and stretch wires without let or hindrance. It is necessary for its fire protection and a proper knowledge of the obstructions of its streets and the use to which its public places are being subjected for the city to know before any construction is put in what is contemplated, and to have the work done under the supervision of its officers, and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city.”

Then, referring to the complainant's contention that it

could lay conduits, erect poles, etc., without a permit from the city regulating the same, the court said:

“We think, in taking that portion it was mistaken, as there was no intention on the part of the federal government in permitting the complainant to use its post roads to dispossess the States and municipalities of the control of them; but the permission was given like any other franchise granted to a corporation — to be exercised in subordination to both public and private rights.”

This same case found its way to the same court again (121 Federal 734, *Western Union Telegraph Co. v. City of Toledo*), where the same doctrine is reaffirmed.

Neither the municipality nor the State can absolutely prohibit a telegraph company engaged in interstate commerce and entitled to the benefits of the Act of 1866 from occupying post roads, for that would be an interference with interstate commerce; nor would conditions attached to such use of post roads so unreasonable in character as to amount to inhibition of the right of such a company to erect its poles in such post roads be sustained by the courts for the same reason, but municipalities and the State may stipulate reasonable conditions and regulations, and companies must comply therewith.

This doctrine finds expression in *City of Richmond v. Southern Bell Telephone & Telegraph Co.*, 65 Fed. Rep., 19 (United States Circuit Court of Appeals, Fourth Circuit). In the course of its opinion it was said by this court that the company (acting under the provisions of the Act of 1866, known as the Post Roads Act), had the right to use the streets of the City of Richmond, and that neither the State nor the municipality could prevent it, but that the use must be subordinate to the rights of the public and must not endanger those rights; that, “as the municipality is the guardian of the public in this regard, it can establish such lawful provisions as may regulate the use, always, however, avoiding such regulations as will make the use burdensome and intolerable, and so practically impossible.” The court also said that the lines of telegraph must not interfere with the ordinary travel, and

that the privileges granted by the Act of 1866 must be subject to the lawful exercise of the police power.

See also:

Joyce on Electric Law, Vol. 1, Sec. 63.

Ganz v. Ohio Postal Telegraph Cable Co., 140 Fed. Rep., 692.

I know of no statute in this State bearing directly upon the right of a telegraph company engaged in interstate commerce, and acting under the Post Roads Act of 1866, to use the public streets and highways of this State. The provisions of "An Act to revise the law in relation to telegraph companies," in force July 1, 1874 (Starr & Curtis, Vol. 3, p. 890), would seem, by its terms, to apply only to domestic corporations; and, as to domestic corporations, the Legislature may provide that no company shall have the right to erect poles in any street without the consent of the municipality, thus putting it within the power of the municipality, by withholding its consent, to prohibit the use of such streets entirely; but such an act would be ineffectual as an interference with interstate commerce, if it should be attempted to so apply it to a company thus engaged under the provisions of the Act of 1866.

I find but two ordinances, in force within the present territorial limits of Chicago, running directly to the Western Union Telegraph Company. One is a grant by the Board of Trustees of the old Village of Hyde Park, passed and approved June 27, 1884, authorizing the erection of poles, etc., for a fixed distance on Sixty-first street. This ordinance contains no limitation as to time.

The other is an ordinance by the Board of Trustees of the Town of Lake, passed April 21, 1882, and authorizing the erection of poles, etc., in certain portions of Wallace street and Forty-eighth street. This ordinance expired by its terms in ten years from and after its passage. (Special Ordinances, Vol. 1, Sections 1896 and 1897.)

A number of grants to other telegraph companies have been made from time to time by villages now forming a part of this city, and by the city itself, some of which have expired by lapse of time and others containing no time limitation.

I do not know, and have not deemed it necessary to ascertain, whether the Western Union Telegraph Company has succeeded to the rights of any or all of these various grantees, for, under its authority to regulate and control, the City Council, under date of December 16, 1907, passed an ordinance (Council Proceedings, page 3566), expressly granting permission and authority to every telegraph company which has accepted the provisions, restrictions and obligations of the Act of Congress of 1866 to occupy the streets, alleys, public grounds and places within the city with its poles, wires, posts, conduits, etc., for a period of ten years from and after the passage of the ordinance, and fixing a stipulated amount to be paid each year for each pole so erected in any street, alley, public ground or public place within the city.

It appears, therefore, that this company is now occupying the public streets of the city with its poles, conduits, etc., under the act of Congress referred to, recognized and regulated by the ordinance of December, last.

Your second question submitted, i. e., whether the City of Chicago has power to compel this company to place its wires underground, will be answered in a separate communication.

Yours very truly,

GEORGE W. MILLER,
First Assistant Corporation Counsel.

FEBRUARY 29, 1908.

L. E. GOSSELIN, Esq., Deputy Comptroller.

Dear Sir:

Your letter of February 6, addressed to the Corporation Counsel, on the subject of the power of the City of Chicago to enforce payment of the salaries of firemen stationed in the various theaters in Chicago, has by his direction been referred to me.

Sections 311, 349 and 380 of the Revised Municipal Code of Chicago of 1905 require that firemen, members of the city fire department, shall be stationed at the various theaters and that their salaries shall be paid by the owners of such theaters.

A refusal by the owners of theaters to pay these salaries will probably be based on the claim that the ordinance is not a valid exercise of the police power of the city as granted to it by the State in Paragraph Sixty-sixth of Section I of Article V of the Cities and Villages Act, which is as follows:

“Sixty-sixth.— To regulate the police of the city . . . and pass and enforce all necessary police ordinances.”

or of the power granted in Paragraphs Forty-first and Fifty-eighth of said section, which are as follows:

“Forty-first.— To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, . . . keepers of *theatricals or other exhibitions, shows and amusements*, and to revoke such licenses at pleasure.”

“Fifty-eighth.— To regulate *places of amusement*.”

Under these two latter paragraphs, the power of regulation by the city of theaters is very broad. The Supreme Court of Illinois has never determined the question of the extent of this power over theaters or other places of amusement. It has been held, however, that the Forty-first paragraph above quoted gives to the City Council the power practically to impose such conditions upon pawnbrokers as it may see fit.

Launder v. City of Chicago, 111 Ill., 291.

That the City Council has the right under these grants of power to impose a license on theaters is clear — so clear that it seems never to have been questioned in Illinois. In many other jurisdictions similar grants of power have been construed as giving cities authority to impose such a license.

Abbott, Municipal Corporation, Vol. 2, p. 994.

Am. & Eng. Ency. of Law, 2d Ed., Vol. 28, pp. 116-118.

Boston v. Schaeffer, 9 Pick., 415.

Bell v. Mahn, 121 Pa., 225.

Germania v. State, 7 Md., 1.

Orton v. Brown, 35 Wis., 426.

Hodges v. Nashville, 2 Hump., 61.

Duluth v. Marsh, 71 Minn., 248.

Downing v. Blanchard, 12 Wend., 383.

Baker v. Cincinnati, 11 Ohio St., 524.

Charity Hospital v. Stickney, 2 La. Ann., 550.

In *Charity Hospital v. Stickney*, *supra*, the court said, page 551:

“This power (the power to license) is believed to be vested in the government of all countries, and is, throughout the Union, exercised both as to the permission and superintendence of theatrical representations open to the public, which are only exhibited under license.”

In *Duluth v. Marsh*, *supra*, the Supreme Court of Minnesota points out the necessity of giving to municipal corporations a wide discretion in the matter of regulating theaters. The court, in the course of its opinion, said, page 249:

“In respect to theatrical exhibitions and amusements of similar character, a larger discretion on the part of municipalities is recognized than in the case of ordinary trades or occupations, both because they are liable to degenerate into nuisances, and also because they require more police surveillance and police service.”

It is well recognized by the courts that theaters and amusements necessarily need to be subjected to municipal regulation to a much greater extent than other kinds of business.

City of Mankato v. Fowler, 32 Minn., 364.

In this case the court said, page 366:

“In respect to exhibitions, amusements, etc., a larger discretion on the part of the municipal corporation is recognized than in the case of trades and useful occupations.”

See also:

Freund, *Police Power*, Paragraphs 250-251.

Western Turf Association v. Greenburg, 204 U. S., 359.

Boston v. Schaeffer, 9 Pick., 345.

Robertson v. Haneger, 5 Sneed, 257.

In the case last cited the Supreme Court of Tennessee, speaking of the propriety of imposing a license fee or tax on manageries, said:

“A more fit and proper subject for taxation could not well be selected, if permitted to enter our borders at all, than these idle, vagabond strollers, which our population are, perhaps, too much induced to patronize.”

Almost the same words might well be used with reference to many theatrical exhibitions.

The law seems also to be well settled that the grant of a license does not waive the right of a municipal corporation to subject the business licensed to all further necessary and reasonable police regulations.

Maxwell v. Jonesboro, 11 Heisk., 257.

Bowling Green v. Carson, 10 Bush., 64.

Baldwin v. Smith, 82 Ill., 162.

In re Schneider, 11 Oregon, 288.

Horr & Bemis' Municipal Police Ordinances, paragraph 265.

The authors of the work last cited say:

“It follows from the nature of license exactions as mere police regulations, that the payment of a license fee in nowise exempts the licensee from any of the burdens imposed by other laws and ordinances.”

It would seem that there can be no doubt but that the city, in the exercise of its police power, properly may require firemen to be stationed in the various theaters for the protection of life and property in case of a fire or panic, and it would seem to follow that if employees or officers of the city are designated for this purpose the city should be compensated for the services rendered. These services are rendered necessary by the unusual danger to life occasioned by a theater fire. A fireman so stationed must give his entire time to the theater; the city is thus deprived of his services. The benefits of such services accrue especially to the owner of the theater, giving confidence and a feeling of security to his patrons, which, in the end, necessarily must benefit his business.

The courts have recognized the principle that compensation for police protection to theaters may be had *by way of license*.

Baker v. Cincinnati, 11 Ohio St., 534.

In this case the court said, pp. 534-5:

“A charge for a license may be made in view of the special inconvenience and expense to the government, for the benefit of the individual who asks for such license. . . .

The exhibition may require additional attention from those entrusted with the care of the public peace to prevent disorder and disturbance. The burden thus devolved on public officials, requiring, perhaps, an increase in their number or compensation, for the benefit of exhibitors of shows or performances, may justly authorize a charge beyond the mere expense of filling up a blank license."

On this general proposition of law see also:

Jacksonville v. Ledwith, 26 Fla., 163.

Charlotte, etc., R. R. Co. v. Gibbs, 142 U. S., 386.

Morgan v. Louisiana, 118 U. S., 455.

It may be urged that while the city may compel the owners of theaters to station competent firemen of their own choosing in their theaters, they may not be compelled to accept firemen in the city's employ and to pay the salaries of such firemen. In my opinion, this point is not well taken. If a fireman is needed at all at a theater, he should be *under the discipline and orders of the fire department* of the city in order that he may do effective work in case of fire. Coöperation between the fireman stationed at a theater and those firemen who come from the city's fire engine stations is absolutely necessary, and this can best be obtained when all the firemen are under the command and subject to the orders of the same chief. And it is not to be presumed that the employment of competent firemen outside of the city's service will be less burdensome to the owner of the theater than the employment of firemen in the service of the city.

On the precise question now being considered, courts of last resort seem, as far as I have been able to investigate, to have passed but twice; once in Arkansas and once in Alabama. These cases are:

Waters v. Leech, 3 Ark., 110.

Tannenbaum v. Rehm, 44 Southern, 532.

Also reported in 11 L. R. A. (N. S.), 700.

In the Arkansas case, which was decided in 1840, it was held that an ordinance which required a city constable to attend at every performance in a theater, and which required the owner of the theater to pay to the constable \$2.50 for each performance, was unreasonable and void.

In the Alabama case, which was decided July 2, 1907, it was held that under grants in the charter of the city of Mobile, which provided that the general council "shall have and exercise full police powers within the limits of the city of Mobile"; that it shall be their duty "to protect the rights of persons and property, . . . to preserve order," and that they shall have the right and power to regulate theaters, the general council might, by ordinance, require a city fireman to be assigned to all performances in any theater and require the theater owner to pay for his services. In the course of its opinion the court said:

"The ordinance can not be said to be unreasonable, in that the city assumes to designate the man to perform the particular service, or imposes the cost of such service upon the manager. The duty of protecting the person or citizen from dangers of fire in the exercise of the police power would seem to carry with it the right to employ the most effective means to that end; and this would include the right of designating competent agents or servants for the performance of such duty. The doctrine as to the right of the municipality to impose the cost of the performance of such services by the fireman on the manager of the theater, as was done in the case at bar, was upheld in the case of *New Orleans v. Hop Lee*, 104 La., 601, 29 So., 214, and in the case of *Harrison v. Baltimore*, 1 Gill., 264."

In my opinion, the opinion in the Alabama case is the better reasoned. It also is the latest case on the subject, and is thus entitled to great weight. I believe it would be followed by the Supreme Court of Illinois.

While, for the reasons hereinbefore stated, I am of the opinion that the city may collect compensation for *all* the services of firemen stationed at theaters under the provisions of the Code, another ground may be urged upon which the city may base its right to collect compensation for the services of firemen for the time they were stationed in theaters operated under licenses *obtained after the passage of the ordinance*. It has been held in Illinois that one accepting a license, accepts with it all the terms imposed. In the case at hand the theater owners in accepting a license may be said (by

implication at least) to have agreed to accept, and assent to be bound by, the ordinance requiring them to pay for the services of firemen and policemen.

Malkan v. City of Chicago, 217 Ill., 471.

In view of what has been said, I advise you to demand payment of all unpaid warrants for amounts due the city for services of firemen at theaters. Warrants unpaid after such demand shall have been made should be forwarded in due course to this office for collection.

In a chancery suit (*Webb v. City of Chicago, et al.*), now pending, the question of the right to enforce payment for services of firemen has been raised by a cross-bill filed by the city. This suit, however, will not soon be decided. Before a decision is reached in the chancery suit, it may be possible to get a decision in a suit at law instituted for the purpose of enforcing the payment of some of these warrants.

In your letter of February 6th you mention, also, the question of the right or power of the city to enforce payment for services of policemen stationed at theaters. As you are aware, there has been no ordinance of the city requiring policemen to be stationed at theaters and requiring the owners of such theaters to pay for the services rendered by policemen assigned to such duty. The legal points involved are not the same as those involved in the question of the power of the city to enforce the payment for services of firemen stationed at theaters under the provisions of the Municipal Code. At your suggestion, therefore, I have not considered the question of the power of the city to enforce the collection of claims against theater owners for services of policemen.

Yours very truly,

EDWIN H. CASSELS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

MARCH 5, 1908.

A. W. BEILFUSS, Esq., Chairman, Sub-committee on Finance.

Dear Sir:

In answer to your verbal communication of recent date as to the liability of the city for damages done to the water pipes on the premises of Frederick Freiberg, 180-182-184 East Twenty-second street, when such damage is caused by electrolytic action, I would respectfully submit the following:

In *Murphy v. City of Chicago*, 29 Ill., 279, Murphy sued the city in an action on the case for damages occasioned by the city allowing a railroad company's tracks to be laid in Water street and raising the grade of the street, for which the plaintiff claimed damages. The court said:

"It is a settled law of this court, as well as in most of the other States of this Union, that it is the legitimate use of a street or highway to allow a railroad track to be laid down in it, and for doing so the city is not liable for any damage which may occur to individuals."

Abbott on Municipal Corporations, Section 974, states that:

"Where a public corporation grants, under authority of law, a license, privilege or franchise for the use of its public ways to private persons, the usual rule obtains that it will not be liable for the acts of such grantee, though they may be negligent and result in injury."

Jones on Negligence of Municipal Corporations, Section 82, in referring to damages arising from the granting of licenses, states that:

"Some interesting cases have arisen upon the question of municipal responsibility for the negligent acts of licensee in the public streets. In general, it may be stated that there is no responsibility for such acts, as *licensees are not servants of the municipalities*, and as the granting of licenses under proper ordinances involves the governmental power of legislation."

In the City of Grand Rapids, at a meeting of the common council, an ordinance was passed directing Fountain street as one of a number of public streets and highways of said city in which the unlawful and dangerous sport or amusement commonly called "sliding down hill" could be engaged in by

all persons desiring to participate in the same. In deciding the case, the court said:

“The common council, having a full control of the streets, has licensed the use of a particular street in a particular way differing from the ordinary use. In doing so it must be supposed to have determined that the use in that way will not interrupt or interfere with such customary use of it for passage or travel as the public may have occasion for. The decision to this effect is made in the exercise of its discretionary and governmental authority over a subject confided by the State to its judgment and is presumptively correct. But whether correct or not, no appeal from the judgment of this court to the court of appeal has been provided for, and therefore none can be had. An indirect appeal by statute against the city to establish a liability against it for an erroneous legislative determination is not one provided for, but it would be opposed to a principle as well settled and as familiar as any in government. It would not follow that parties acting under the terms would not be liable. Any person making use of the public highways must use them with care and must have due regard to the rights of others. Those having occasion to use them for the customary purposes of travel and passage have the first right, and their use must not be obstructed except under circumstances that are quite exceptional and that make out a clear excuse. Whether there are such circumstances in this case we do not know, as we have before us such facts only as are given in the declaration. We agree with the circuit judge that no case is made out against the city and no further question is before us.”

Burford v. City of Grand Rapids, 53 Mich., 98.

In the *City of Michigan City v. Boeckling*, 122 Ind., 39, the court held:

“Where a city authorizes a track to be laid on a plank-covered street for the use of a street railway company, the iron rails projecting four inches above the planked surface, and permits it to remain in that condition to the injury of persons using the street for travel, it is liable for its own negligence in failing to exercise the ordinary care and skill required of a

municipal corporation in making and keeping its streets in a reasonably safe condition for travel of persons.”

The ordinance authorized the laying of the iron rails with a four-inch projection, thereby showing lack of ordinary care on the part of the municipality. The fact that iron rails projected four inches above the planked surface of the street justifies the conclusion of the jury that the city had not discharged the duty imposed upon it by law. Under the rule generally accepted as a correct one, there can be no doubt but that the projection of the rails in the appellant's street was an illegal obstruction. The ordinance passed by the City of Michigan City permitted the laying of four-inch rails on a planked surface in a manner which was undoubtedly negligence *per se*.

In *Lincoln v. City of Boston*, 148 Mass., 578, the court held:

“The City of Boston is not liable for injuries occasioned to a person by reason of his horse becoming frightened while being driven along an adjoining street by the firing of a cannon on the Common under a license granted in pursuance of a city ordinance. . . . It will be enough to say that the act of the person who fired the cannon was the proximate, or, at least, a concurring cause, and that he was not a servant of the city.”

The rule is also followed in 112 Ind., 576, quoting *Ryan v. Curren*, 64 Ind., 345:

“That municipal corporations are not liable for the acts of persons it licenses to use its streets unless the thing authorized is intrinsically dangerous or the municipal authorities have notice of the negligence of its licensee.”

In defining electrolysis, *Joyce on Electric Law*, Section 7 C, takes as authority the definition laid down in the case of *Lowrey v. Cowles Electric Smelt. & Alum. Co.*, 68 Fed. Rep., 354:

“Whenever a current of electricity of sufficient quantity and intensity is passed through a chemical compound in a fluid condition a chemical disruption is caused, one of the elements of which will go to the anode, or place at which the current enters the fluid mass, and the other will go to the

cathode, or the place at which the current leaves it, and this chemical dissolution is called 'electrolysis.' "

City of Dayton v. City Railway Co., 12 Ohio, D. N. P. 258, 1902.

I find this is a leading case on electrolysis, treating the subject fully and at great length. The court decided that the City Railway Company of Dayton should be enjoined from so operating its railway as to avoid injury to the city or private water pipes by electrolysis, compelling it to introduce such improvements in the system in order that the operation of the single trolley authorized by the franchise and contract will be in accordance with the present standard of the art of operating single trolley lines.

In American Electrical Cases, Volume 7, page 622, I find cited at length, the case of Cagliona v. Electric Light Co., New York Supreme Court, Appellate Division, First Department, December, 1900, wherein the court held that:

"The law undoubtedly is that when a corporation for its own purposes undertakes to bring into the streets of a city a substance which is known to be as dangerous as electricity, it is bound to take all the care that a reasonable person can take to see that it does not escape in such a way and under such circumstances as to be dangerous to human life."

Quoting from Cyc. of Law & Procedure, Volume 15, page 478:

"The facts that a defendant conducts electricity to a certain place, that electricity so employed may escape in such a way as to produce an injury; and that an injury from electricity is actually occasioned in a place where the injured party has a right to be, are usually held to constitute a *prima facie* case of negligence and shift upon defendant the burden of showing that he was not negligent." Citing cases in California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Missouri, New Jersey, New York, North Carolina, Oregon, West Virginia.

Applying the principle laid down in cases quoted, there can be no liability attached to the city for the damage caused by the electrolytic action on the water pipes of Mr. Freiberg. The doctrine is generally accepted in this State that no

private action can be maintained against the municipality to recover damages that may have occurred by the negligence of a licensee.

It is, therefore, my opinion that Frederick Freiberg's redress must be against the company or companies who are responsible for the destructive presence of electrolytic action. From an examination of the authorities, it seems that the city is liable only when it specifically authorizes a thing to be done in a negligent manner whereby injury ensues.

From appended report of William Carroll, City Electrician, it appears that the South Side Elevated Railroad Company is the offender.

There being no legal liability on the part of the city, I would, therefore, recommend that the claim of Frederick Freiberg be not allowed.

Yours very truly,

ROBT. L. CAMPBELL,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

MARCH 13, 1908.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO:

Gentlemen:

At your meeting of March 9, 1908, you were pleased to adopt a resolution instructing the Corporation Counsel to report at your next meeting, "his opinion on the following points":

"First. Has the Council any legal right to make inquiry into the methods of the Board of Assessors and the Board of Review?"

"Second. If this Council has a legal right to make inquiry, to state what proceedings are necessary to obtain the desired result upon the question of unfair taxation and to obtain justice for the taxpayers of this city?"

The Corporation Counsel has directed me to give the matter my attention, and I have the honor to report that, in my judgment, the City Council has no right to make any inquiry into the methods of the Board of Assessors and the Board of Review.

All questions in reference to the method and collection of taxes are purely statutory, and under the Constitution the value of property, for the purpose of taxation, is to be ascertained by a person or persons elected or appointed in such manner as the General Assembly shall direct and not otherwise.

School Directors v. School Directors, 232 Ill., 322, 324.

The Revenue Act provides that in this county assessment of property for taxation shall be made by the Board of Assessors subject to the action of the Board of Review.

The city has only those powers that are expressly given to it or that flow by necessary implication from an express grant, and there is nothing whatever in the Cities and Villages Act, or in any other statute, conferring upon the city power to make any assessment for general taxation or to interfere in any manner with any assessment made by the Board of Assessors.

City of Waverly v. Auditor, 100 Ill., 354.

My conclusion is, the city has no right to make inquiry into the methods of the Board of Assessors or the Board of Review.

As to the second point in the resolution, I can only say that the necessary proceedings to be taken by one who thinks he is unjustly taxed depend upon the circumstances in the case, but in no event can the city take any part in any proceedings to review the action of either of these boards.

Yours very truly,

WM. D. BARGE,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

MARCH 13, 1908.

DENNIS J. EGAN, Esq., Alderman Ninth Ward.

Dear Sir:

Your request, of recent date, for the opinion of this office on the power of the city to relieve the crowded condition of Wentworth avenue by requiring dealers to receive and make deliveries of goods through the alleys in the rear of buildings, has been referred to me for answer.

It is doubtful if any attempted regulation, in the manner indicated, of the traffic in this particular district could be sustained as a reasonable discrimination between property owners and dealers on Wentworth avenue, and those similarly situated in other parts of the city, the rule being that a general ordinance must be a reasonable exercise of the power conferred and can not discriminate unreasonably or arbitrarily between persons living or doing business under similar conditions though in different locations within the city limits.

See *Tugman v. Chicago*, 78 Ill., 407.

Zanone v. Mound City, 103 Ill., 556.

Lake View v. Tate, 130 Ill., 247.

Cicero Lumber Co. v. Cicero, 176 Ill., 23.

An examination of the authorities, however, leads to the conclusion that an ordinance such as you propose is objectionable on other grounds.

Courts and writers have, from the earliest times, recognized as coexistent with the right of the public to pass back and forth upon a highway, the separate and distinct right of each abutting property owner to have access to his premises for all reasonable purposes. According to Dillon the right comes from the very relation of the lot to the street in front of it, and it is also said:

"These rights (of access), whether the bare fee of the streets is in the lot owner or in the city, are rights of property, and as such ought to be and are as sacred from legislative invasion as his right to the lot itself."

Dillon, *Municipal Corporations*, Section 656a.

In Illinois the right of access has been expressly recognized in the case of *Chicago v. Union Bldg. Assn.*, 102 Ill., 379, where it is said on page 397:

“Property holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets which can not be taken away or materially impaired by the city without incurring legal liability to the extent of the damages thereby occasioned.”

To the same effect see *McCormick v. South Park Com'rs.*, 150 Ill., 529.

The right is reasserted with special reference to sidewalks in *Garibaldi v. O'Connor*, 210 Ill., 284, where the court said, page 287:

“The sidewalks belong to the public and the public primarily have the right to the free and unobstructed use thereof, subject to reasonable and necessary limitations, *one of which is the right of an abutting property owner to temporarily obstruct the walk* by loading or unloading goods, wares, or merchandise when such obstruction is reasonably necessary.”

The only instance noted in which the courts have sustained the power of a municipality to exclude traffic vehicles from a public street is where the board of trustees of a town passed an ordinance designating the street in question as a pleasure driveway and prohibiting the use of traffic vehicles thereon under the express authority conferred by the Act of the Legislature approved March 27, 1889, “to provide for pleasure driveways in incorporated cities, villages and towns.” (Hurd’s Rev. Stat. 1905, Ch. 24, Sec. 435). In the case of *Cicero Lumber Co. v. Cicero*, 176 Ill., 9, owners of property fronting on the affected street resisted the exercise of the power conferred by this act on the ground that it deprived them of property rights without due process of law and without just compensation, in violation of Art. II, Secs. 2 and 13 of the Constitution of Illinois.

The Supreme Court, however, sustained the action of the trustees, taking this position: that since the streets are for the use of the public, the Legislature, as the representative of the public, may confer upon a municipality the power to limit the use of a street to a particular purpose so long as the benefits resulting from such a change are shared by all citizens alike. In such cases, therefore, the paramount control of the

Legislature is exercised, not to deprive the abutting owner of his right of access, but to *limit the right to such uses as are not inconsistent with the uses for which the street is held for the public at large*. The lot owner's right of access is qualified only to that extent.

While the city is without power to deprive an individual of access to his premises from the street and can not restrict the manner in which he exercises the right, except, as already indicated, by limiting the use of the entire street to certain purposes, it must not be supposed that the individual has the right, in conducting his business, to collect teams or merchandise in front of his premises so as to interfere with public travel. It is well recognized that the abutting owner's use of the highway for the purpose of loading or unloading merchandise must be only what is necessary and reasonable under the circumstances. With reference to what is a reasonable use of the street for such a purpose the New York Court of Appeals has recently said, in the case of *Murphy v. Leggett*, 164 N. Y., 126 :

"Places and circumstances widely differ. That which would but slightly inconvenience the public in one place, might in another very seriously impede and discommode travelers. The use by a merchant of a back street but little traveled might be reasonable and justified, while a like use of a main thoroughfare constantly crowded with passing people would become at once unreasonable and a nuisance that could not be tolerated. Reasonable use, therefore, is ordinarily a question of fact depending upon its being temporary and necessary, having reference to time, place, and circumstances."

And in *Garibaldi v. O'Connor*, *supra*, at page 287, our own Supreme Court has placed the limitations upon an abutting owner's use of the sidewalk, as follows :

"A merchant or business man can not be permitted to so conduct his business of receiving and delivering the commodities in which he deals that the sidewalks shall be substantially appropriated to the transaction of his affairs. A business which has reached that magnitude can not be accommodated by the appropriation of the public sidewalks to its purposes, but the proprietor must enlarge his place of business,

procure another location which will meet its demands, or otherwise provide for the transaction of his business in such manner that the public will not be asked to submit to other than reasonable and merely temporary obstructions of the public way.”

In other words, any such appropriation of the street or sidewalk for business purposes as amounts to a substantial interference with public travel is to be regarded in the same light as any permanent obstruction; that is, as a public nuisance. See *Chicago Cold Storage Co. v. The People*, 224 Ill., 293.

Under the powers delegated to the City Council to prevent and remove obstructions to streets and to abate nuisances there can be no doubt as to the power to relieve congestion of the streets caused by the operations of dealers and others in making and receiving deliveries of merchandise. As a matter of fact an effort in this direction has already been made through the following ordinance, found in the Revised Municipal Code of 1905, Section 2134:

“BLOCKADE—POLICE DUTY.—Whenever from any cause, any street or alley of the city shall be obstructed by a press of teams attached to vehicles, loaded or otherwise, the mayor, or any alderman or police officer may give such directions in regard to the removal thereof as may be required by the public convenience. Any person or persons refusing or neglecting to obey such directions shall be fined not less than five dollars nor more than twenty-five dollars for each offense.”

It would seem that careful policing of an overcrowded district under the authority of the above section should do much toward improving the conditions complained of. Or is it unlikely that such supervision, by demonstrating to the dealers on Wentworth avenue that they can not be permitted to obstruct traffic to an unlimited extent, would cause many of them voluntarily to make use of the alley for the purpose of loading and unloading goods. It is believed, therefore, that an adequate detail of police to prevent unreasonable obstructions during the rush hours is the extent of the city's power to relieve the situation, and that, on the other hand,

there is no power to deprive the abutting owners altogether of the right to have such access to their premises as is "necessary and reasonable" in carrying on business.

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

MARCH 28, 1908.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In compliance with order of the City Council, appearing in the Council Proceedings of March 5, 1908, on page 4276, reading as follows:

"ORDERED, That the Corporation Counsel be and he is hereby requested to prepare and submit to this Council, at his earliest convenience, an opinion as to whether or not the Chicago & Western Indiana Railroad Company by virtue of a track elevation ordinance passed October 23, 1899, and all ordinances amendatory thereto, has the right to use the streets and alleys west of its right of way between Fortieth and Forty-second streets as its own property to the exclusion of the public, by reason of the fact that it has acquired the title to the abutting property on said streets; also whether said streets and alleys were vacated and discontinued for the use of the Chicago & Western Indiana Railroad Company, under the terms of the aforesaid ordinances,"

Permit me to submit the following:

The ordinance under which the Chicago & Western Indiana Railroad Company was required to elevate its tracks was passed October 23, 1899, and appears in the Council Proceedings of that date beginning at page 1394. It is a general

ordinance requiring the Pittsburg, Ft. Wayne & Chicago Ry. Company, its lessee, the Pennsylvania Company, the Pittsburg, Cincinnati, Chicago & St. Louis Ry. Company, the Chicago & Western Indiana Railroad Company, the Chicago & Grand Trunk Ry. Company and the Union Stock Yards & Transit Company to elevate their tracks within certain specified limits, differing as to each road. With special reference to the Chicago & Western Indiana Railroad Company, it provides for the elevation of its tracks from a point approximately 250 feet south of the south line of Seventy-second street extending north to Twenty-first street (see Paragraph 2 of ordinance).

Section 9 of the ordinance in question provides for the vacation of the streets and avenues and reads as follows:

“Any and all portions of any streets, alleys or avenues extending into or across any of said lines of railway within the limits hereinbefore provided for the elevation of the said roadbeds, or any of them except the streets and avenues enumerated in Section 4 and in which subways are required to be constructed, shall be and the same are hereby discontinued and vacated under the elevated roadbeds and tracks in this ordinance described *AND within the limits of the right of way* of any of said railway companies.”

The right of the city generally to vacate or discontinue a public street in connection with the elevation of tracks, where done by an ordinance passed by a three-fourths vote, has been held to exist by our Supreme Court in the case of *People ex rel. v. Atchison, Topeka & Santa Fe Ry. Company*, 217 Ill., 594; also in the case of *Weage v. Chicago & Western Indiana Railroad Company*, 227 Ill., 421.

In the latter case our Supreme Court passed upon the rights of this same railroad company to occupy portions of Stewart avenue with its elevated embankments under the provisions of this identical ordinance.

The question for determination here is as to what was intended in the ordinance by the language — “and within the limits of the right of way of any of said railway companies.”

The United States Circuit Court of Appeals, in the case of *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 152 Fed.

Rep., 849—decided April 3, 1907—wherein there was a controversy between the two companies under a contract granting the right to the St. Louis Company to use the “right of way” of the Wabash Company, held:

“The ordinary signification of the term ‘right of way’ when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes is the entire strip or tract of land it owns or is entitled to use for this purpose, and not any specific or limited part thereof, upon which its main track or other specified improvements are located.”

citing in approval thereof:

Joy v. St. Louis, 138 U. S., 1.

Territory of New Mexico v. U. S. Trust Co., 172 U. S., 171.

Chicago & Alton R. R. Co. v. People, 98 Ill., 360.

Lake Erie & W. R. C. v. Middlecoff, 150 Ill., 27.

Pfaff v. T. H. & I. R. R. Co., 108 Ind., 144.

From a reading of this late decision of the United States Circuit Court of Appeals and the application of the rule therein laid down to the facts in the present case, it would seem to admit of but slight doubt that the vacation of streets and alleys under the ordinance of October 23, 1899, included all such portions of streets and alleys within the territory extending from Twenty-first street to Seventy-second street, where no subways are provided for, as may be covered not only by the elevated tracks, the elevated embankments upon which the tracks are laid, but also such portions of streets and alleys as may be included in any land lying west of said embankments held or owned by the railroad company for railroad purposes, as defined in said decision.

The precise question, however, under the provisions of a track elevation ordinance as to the respective power of the City Council to vacate and the rights of a railroad company under such an ordinance, that is, what portion of a street or alley not covered by an elevated embankment may be vacated by the city and turned over to a railroad company for its exclusive use, has never been presented to our courts for determination.

The language of the ordinance under consideration in this particular respect is, in my opinion, so general as to render it indefinite, and after a personal investigation of the physical conditions existing with reference to the occupancy by the Chicago & Western Indiana Company of this wide strip of land, and its total exclusion of the public therefrom, under its interpretation of the ordinance, and the further consideration that the same question will undoubtedly arise in the near future with reference to other railroad companies under this or similar track elevation ordinances, render it advisable that a test be made under the facts existing in this present case with a view of securing from our courts a definite expression upon the questions here involved.

I might add further, in this connection, that a more favorable condition, as regards the interests of the city, can hardly be presented upon which to secure a decision than exists in the present case.

I would, therefore, respectfully recommend to your honorable body that the necessary steps be taken by this department to compel the railroad company to establish its right to the occupancy of the streets and alleys in question through the medium of judicial proceedings.

Yours very truly,

OSCAR H. OLSEN,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

APRIL 10, 1908.

FRANK I. BENNETT, Esq., Chairman, Finance Committee.

Dear Sir:

Your communication of March 31, re-referring the claim of A. T. Dindot and I. Robitachek to this office, with the request that the matter be investigated and an opinion furnished your committee as to the liability of the city in cases of this character, has been referred to me.

In the course of my investigation I have received an additional statement respecting these claims from Francis Shanley, Foreman of Repairs of the Bureau of Sewers, in which he states that:

“There may have been some defect in the pipe which was not noticed at the time the sewer was built, and this may have originated the trouble. We have these cases right along, and it is impossible to say with certainty what causes most of them.

“The sewage backed up into the basements because the main sewer was stopped at the location given (North Kedzie avenue south of Cortland street), and all drains south of that point had no outlet, as the main sewer runs to a dead end at Bloomingdale road.”

A general rule “as to the liability of the city in cases of this character” is all that can be given, as each case must be decided upon its own facts. My opinion is that the best general rule for cases of this character is the one given by Baron Alderson in the case of *Blythe v. Birmingham Waterworks Co.*, 11 Exch., 783, as follows:

“I am of opinion that there was no evidence to be left to the jury. The case turns upon the question, whether the facts proved show that the defendants were guilty of negligence. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

It may be said that a municipal corporation is under no

obligation to provide for surface drainage except so far as may be necessary to preserve the safety of its streets or to ameliorate some conditions which it has itself created it may do so under authority of the Legislature. This authority the city received in its charter under the power to construct and keep in repair culverts, drains, sewers and cess-pools, and to regulate the use thereof.

Section 63, Cities and Villages Act.

City of Jacksonville v. Doane, 145 Ill., 23.

The rights and duties of a municipal corporation or other local subdivision of the State and of the officers carrying on their work with respect to surface water generally are governed by the same rules which govern the relations of individuals with respect to such matters. Originally it seems that the distinction between "sewer" and "gutter" or "drain" was that the sewer was constructed by and under the control of the public which the public generally had a right to use, while the latter was a private means of disposing of surplus water. In *Wetmore v. Fisk*, 15 R. I., 354, it is said:

"Formerly the word 'sewer' was used for a fresh water trench, compassed in on both sides with a bank; a small current or little river. . . . More recently, however, and probably from the appropriation of the word in acts and ordinances to the common conduit of liquid filth, it is usually associated with such a use. Thus, Webster defines 'sewers': 'A drain or passage to convey off water and filth underground.' For 'drain' he gives: 'A water course; a sewer.'

"A municipal corporation can not collect surface water and discharge it in a mass on to the land of a private property owner. This rule prevents the drainage of ponds on to adjacent lands. The liability of the municipality is not affected by the fact that the property is below grade."

Weir v. Plymouth, 148 Pa., 566.

"It is immaterial whether the drain is constructed for the purpose of turning the water onto the adjoining property, or the flooding is a necessary result of the act. It is a trespass in either case."

" . . . Upon neither principle nor authority is there an exemption from liability when an individual has received

an injury, accomplished by a corporate act which is in the nature of a trespass upon his property. It is immaterial whether this gutter was expressly constructed in order to cast this water on plaintiff's land or whether it was so constructed that the flooding must be the necessary result. Having, after intercepting the natural flow of this water, undertaken to gather up and conduct it in another direction, by an artificial channel, it was incumbent on the city to use reasonable care to do this in such a way as not to cause a positive trespass upon the lands of others. To fail to do this is negligence. Such was the fact in this case, and this brings it within the principle of the cases last cited. See, also, *Ashley v. Port Huron*, 35 Mich., 296."

Pye v. Mankato, 36 Minn., 373.

The city is bound to construct its streets and sewers in a proper, cautious, careful and skilful manner, and in such way as to effectually care for and carry off the water that naturally passed through the channel, and is liable for all damages resulting from its failure to do so.

Mears v. Town of Wilmington, 9 Ired., 73.

Perry v. City of Worcester, 6 Gray, 544.

Row v. Granite Bridge Co., 21 Pick., 344.

City of Indianapolis v. Huffer, 30 Ind., 235.

M'Clure v. City of Red Wing, 28 Minn., 186.

Our own Supreme Court has taken strong ground on subjects of this character, and in *Kimball v. City of Elgin*, Chief Justice Craig, in delivering the opinion of the court, said:

"While a city may change the grade of a street at will or pleasure, yet, where it is changed and sewers or drains are constructed for the purpose of carrying off surface water, and they are constructed in such an imperfect manner that the water is turned into the basement of a building of a lot owner on the street, the city will be liable for such damages as may arise from the defective improvement."

Kimball v. City of Elgin, 90 Ill., 356.

(Citing with approval *City of Aurora v. Gillett*, 56 Ill., 132; *City of Aurora v. Reed*, 57 id., 29; *City of Bloomington v. Brakaw*, 77 id., 194.)

When the doing of an act does not necessarily involve the trespass upon the adjoining property, but the injury is an incidental effect of the act, the injury may appear to be consequential. Such an injury, for which there is no liability to make amends, is one which attends the doing of an act which the person doing it has a perfect right to do in the way in which he does it. So, that to determine whether or not an injury is consequential, the lawfulness of the act causing it must be ascertained. When the act is done by the State, there is no redress unless expressly given by the Constitution or statutes, and under the forms of the Constitution which provide compensation for property taken, only, a strict construction would exclude compensation where the property was merely injured. Our Constitution has changed this rule by providing compensation for property damaged. Municipal corporations are not entitled to all the immunity belonging to the State. They become liable, not only when compensation is provided by the Constitution or statute, but also when they are guilty of negligence.

“The city will be responsible for the injuries which it does, when reasonable care and skill would have provided better facilities.”

McClure v. Red Wing, 28 Minn., 186.

And it is immaterial on the question of liability whether the wrongful act is the result of purpose or the result of improvements undertaken with no intention to injure the adjoining proprietor. Judge Lawrence, in *Nevins v. Peoria*, 41 Ill., 502, said:

“The theory that private rights are ever to be sacrificed to public convenience or necessity without full compensation is fraught with danger, and should find no lodgment in American jurisprudence.”

“It is clear that if the municipality in the construction of the drain leaves it in such condition that it is likely to become obstructed, it will be liable for the resulting injury in case such obstruction occurs.”

Buchanan v. Duluth, 40 Minn., 402.

Powers v. Council Bluffs, 50 Iowa, 197.

The maxim, "So use your own as not to injure that of another," applies in these cases, and a violation of this rule is negligence and gives a right of action.

If the municipality collects large quantities of surface water, it must provide adequate means to dispose of it, and failure to do so will be negligence.

Bates v. Westborough, 151 Mass.

Emery v. Lowell, 104 Mass., 16.

And if the city attempts to provide for the water so collected and is negligent in doing so it will be liable for the injury which it causes.

Damour v. Lyons City, 44 Iowa, 276.

Frostburg v. Hutchins, 70 Md., 56.

Peoria v. Eisler, 62 Ill. App., 26.

Aurora v. Gillette, 56 Ill., 132.

It being established that a municipal corporation is liable for negligent and wrongful acts which cause surface water to be thrown upon adjacent property, the rule renders the municipality liable in case, after it has constructed drains to carry off surface water, it obstructs them or negligently permits them to become obstructed in such a way as to cause the water to flow onto private property.

Denver v. Rhodes, 9 Colo., 554.

So, also, it is liable if it negligently obstructs the drain, to the injury of abutting property, or if it permits the drain to get out of repair so that it is no longer sufficient to carry the water which will naturally flow in it.

Alton v. Hope, 68 Ill., 167.

Wessman v. Brooklyn, 40 N. Y., 698.

"The municipality will be charged with notice of conditions which have existed under the immediate observation of its officers for a sufficient time to have enabled it to correct them."

Schumacher v. New York, 166 N. Y., 103.

The exception to the rule in the case of overflow of abutting property to the damage of private ownership is that a municipal corporation is not bound to provide for unusual

and exceptional storms which occur. An unprecedented storm is classed as an act of God, and the injuries caused by it are regarded as inevitable accidents, the consequence of which must rest where it falls. Therefore, the municipality is not liable for injuries caused by the failure of drains provided by it to carry off the water in times of unprecedented storms, if they are sufficient for all ordinary storms.

Keithsburg v. Simpson, 70 Ill. App., 467.

Peoria v. Adams, 72 Ill. App., 662.

Los Angeles Cemetery Assn. v. Los Angeles, 103 Cal., 461.

The proposition that water can not be gathered together by public authorities and left to find its way on to private property is supported by an unbroken line of authorities from which there seems to be no dissenting opinion. There is, therefore, much less reason for recognizing a right to conduct sewage upon or near private property to its injury than there would be in the case of mere surface water, and a private individual may maintain an action for the injury caused to him by such deposit if it causes him special injury.

State v. Portland, 74 Me., 268.

The damage in such case is not only damage to private property, but also to the health of the individual.

It is held that authority to construct drains and sewers will also include the power to require outlets for them, and, if necessary, the outlet may be secured outside of the district seeking to obtain it and the necessary rights of way and other facilities required to render it available.

Schiffer v. Aurora, 121 Ind.

Maywood Co. v. Maywood, 140 Ill., 216.

Cochran v. Park Ridge, 138 Ill., 295.

From these authorities it would appear that an outlet is a necessary element to the construction of a proper drain, and the construction of a sewer but a short distance removed from claimant's property is one of the elements of damage complained of.

The caving in of the sewer at North Kedzie avenue south of Cortland street and the consequent flooding of claimants' basements under the circumstances, as shown by papers on file in this office, is such a damage, in my judgment, as to create

a clear liability on the part of the city, and the claims, as shown by my communication to you under date of March 20, 1908, should be allowed for the amounts therein stated.

Yours very truly,

FRANKLIN A. DENISON,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

APRIL 13, 1908.

WALTER H. WILSON, Esq., Comptroller.

Dear Sir:

The inquiry of Auditor Gosselin, as to the legality of the action of the judges of the Municipal Court in sending prisoners convicted of being disorderly to the Martha Washington Home to serve out the fine imposed, having been assigned me for reply, I beg leave to say, that James Frake, Esq., attorney for both the Martha Washington and Washingtonian Homes, informs me that one institution is simply the complement of the other; that their charters are identical. This being true, I find that Section 5 of the act under which the Washingtonian Home was organized provides as follows:

“Any person sentenced by the authorities of the City of Chicago to the Bridewell or House of Correction for intemperance, drunkenness, or for any misdemeanor caused thereby, may, with the consent of the proper officers of said Home, be received and detained as an inmate of said Home in lieu of the Bridewell or House of Correction, until the expiration of such sentence; and when any such person has been committed to the City Bridewell or House of Correction for any such misdemeanor caused by intoxication or for drunkenness, either justice of the police court may, with the consent aforesaid, cause him to be transferred to said Home for the unexpired term of sentence.”

Judges of the Municipal Court have been substituted for justices of the police court, as for all other Justices of the Peace within the City of Chicago. Whatever might have been

done by justices of the police court may be done by judges of the Municipal Court.

Under the section above quoted, these Homes are authorized to receive and detain as an inmate, in lieu of the House of Correction, etc., any person sentenced by the authorities of the City of Chicago to the House of Correction, etc., for intemperance, drunkenness or for any misdemeanor caused thereby, until the expiration of such sentence; and any such person committed to the House of Correction for any such misdemeanor caused by intoxication or for drunkenness, may, with the consent of the Homes' officers, be transferred for the unexpired term of sentence from said House of Correction to said Homes or either of them.

The Houses of Shelter referred to in Mr. Gosselin's letter are, as perhaps you are aware, simply adjuncts to the House of Correction and of the same general character as that institution.

You are familiar, I take it, with the fact that provision is made where a fine is imposed under the circumstances now being considered, for a per diem credit to be given a prisoner until the amount of his fine, plus the costs, has been fully cancelled.

Section 7 of the Act under which these Homes were organized, provided for payment by the city of ten per cent of all moneys received for and on account of all liquor licenses granted by authority of the county or city, which by amendment was subsequently limited to not exceed \$20,000.00 per annum. But our Supreme Court, in the well considered case of *Washingtonian Home v. Chicago*, 157 Ill., 414, held this section to be repugnant to the Constitution of 1870, in that it was violative of that section of the Constitution which reads as follows:

"No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation."

There follows a proviso which it is not necessary to quote or consider in connection with this matter. In the case above referred to, the court held the *Washingtonian Home* to be a

private corporation and said Section 7 of the Act under which it was organized, unconstitutional and the city prohibited from observing it.

I am, therefore, of the opinion that under Section 5 of the Act of February 16, 1867, which was the act under which these Homes were organized, the judges of the Municipal Court are legally authorized to send such prisoners as you indicate to the Home, provided, such cases of disorderly are caused by intemperance, intoxication or drunkenness, and provided further the proper officers of the Home consent, but it can only be without compensation from the city. If proper officers of the Home, for any reason satisfactory to themselves, wish to receive and detain such prisoners so committed, without pay from the city, and the judges of the Municipal Court, in the exercise of a sound, legal discretion, wish to send prisoners of the class indicated to that institution, I am of the opinion it may be legally done. *Washingtonian Home v. Chicago*, 157 Ill., 414. *County of Cook v. Industrial School for Girls*, 125 Ill., 540.

Yours very truly,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

APRIL 15, 1908.

GEORGE M. SHIPPY, Esq., Superintendent of Police.

Dear Sir:

Replying to yours of April 13, in which you ask whether probationary patrolmen in the police department have a right to vote for a member of the board of trustees of the police pension fund, permit me to say:

The language of the Act approved May 16, 1903, in Jones & Addington's 1903 Supplement to Starr and Curtis' Annotated Statutes, page 89, providing for a board of trustees and their manner of selection, reads as follows:

" . . . The two other persons who, with the members above designated, shall constitute said board, shall be chosen,

one from the active police force and one from the body of pensioners under this act, of such city, village or town. The members to be chosen from the active police force shall be elected by ballot at an annual election, at which election all members of the active police force shall be entitled to vote.
 . . . ”

An examination of the civil service rules and an investigation concerning the facts in relation to the appointment of probationary patrolmen of the police department and their becoming full members shows the following to be the facts, to-wit:

Section 1 of Rule VI of the Civil Service Rules reads as follows:

“VACANCIES. HOW FILLED.—Vacancies in the Classified Service, if not filled by promotion or transfer, shall be filled by requisition and certification as provided in Rule V. The appointment shall be on probation for a period of six months. At the end of this period, if the conduct and capacity of the person appointed have been satisfactory, the appointment shall be deemed complete, but the appointing officer may complete the appointment at any time after the expiration of two months, by certifying such completion to the Commission.”

The six months' probationary service provided for in this rule is as much a part of the examination to determine the fitness of the applicant for the position as is the mental and physical examination provided for in the rules of the Civil Service Commission, and the applicant is not a member of the department until the end of a probationary period, which may extend for six months or in the discretion of the head of the department may be completed at the expiration of two months.

The word “active” in the section of the statute referring to the election of a member of the board of trustees of the police pension fund undoubtedly means those who are actually members of the police department, as distinguished from those who are retired, and in no way refers, as I view the word in that section of the statute, to the duties performed.

The fact that the probationary patrolmen pay a certain

per cent of their salary into the pension fund does not, in my opinion, give them any rights, as they are under no obligations to pay any money into the pension fund until they become members of the department by a final certification from the civil service commission, which can only be after they have served their probationary term of service, and I am of the opinion that the board of trustees of the police pension fund have no right or authority to receive any money whatsoever from the salary of probationary patrolmen.

I am, therefore, of the opinion that probationary patrolmen have no right to vote at the annual election for members of the board of trustees of the police pension fund.

All of which is respectfully submitted.

Yours very truly,

FRANK L. CHILDS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

APRIL 16, 1908.

PAUL P. BIRD, ESQ., Smoke Inspector.

Dear Sir:

Your letter of March 23, addressed to the Corporation Counsel, and asking for an opinion as to whether the city can bring separate suits for violation of the smoke ordinance by separate smoke stacks or chimneys on a single plant, has, by his direction, been referred to me.

The question which you ask is a difficult one. The ordinance does not, in terms, provide for a condition of affairs such as you state. Section 17 of the ordinance provides in part that:

“The emission of dense smoke within the city from the smokestack of any locomotive, steam boat, steam tug, steam roller, steam derrick, steam pile driver, tar kettle or other similar machine or contrivance, or from the smokestack or chimney of any building or premises, excepting for a period of six minutes in any one hour during which the fire box is being cleaned out or a new fire being built therein, is hereby

declared to be a nuisance and may be summarily abated by the smoke inspector or by any one whom he may duly authorize for such purpose."

You will note that "smokestack" and "chimney" are used in the singular, and from this it might be reasoned that the emission of smoke from each single smokestack or each single chimney, in cases where there are more than one smokestack or one chimney on a single building, would be a violation of the ordinance.

I am inclined to think, however, that the whole phrase "or from the smokestack or chimney of any building or premises" should be read together, and that what the ordinance really means is that when the smokestack or smokestacks or chimney or chimneys of a building emit smoke, then there is a violation of the ordinance by *that building*.

If this construction is correct, in the case you put, where a certain factory has four smokestacks and all four smokestacks are upon one building and emit dense smoke at the same time, there will be but one violation of the ordinance. The violation is referable to the *building*, rather than to the separate *stacks or chimneys*.

In view of the construction which I feel constrained to put on that portion of Section 17 above quoted, I advise you that in cases where a building has one steam plant with more than one smokestack or chimney and these smokestacks or chimneys all emit dense smoke at the same time, there is but one violation of the ordinance.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

APRIL 25, 1908.

WINFIELD P. DUNN, ESQ., Alderman, Twenty-fifth Ward.

Dear Sir:

In response to your request for an opinion on the question of the validity of the proposed ordinance amending the

ordinance regulating and licensing boating, bathing and fishing beaches within the City of Chicago, I submit the following:

The proposed ordinance makes two material changes in the ordinance as it now stands.

(1) It requires any person, firm or corporation desiring to establish and maintain a boating, bathing or fishing beach in a residence district to secure the consent of the majority of the *bona fide* householders living within one-eighth of a mile from the center of the principal structure erected or proposed to be erected for the purposes of such beach.

(2) It prohibits the conduct of any other amusements in connection with the conduct of the boating, bathing or fishing beach.

As to the second point, I am of the opinion that the City Council has the right to prohibit the conduct of other amusements in connection with such beaches. This is purely a regulatory measure, and the Common Council has very full power to regulate amusements.

The first point presents a legal question upon which, I must confess, I feel considerable doubt. Nevertheless, after a careful consideration of the proposed amendment, as now drafted, and after a study of the authorities, I am of the opinion that the ordinance is within the power of the City Council and that it is, therefore, valid.

Such power as the City Council may have over boating, bathing and fishing beaches must be found, if at all, in Clauses 41, 58, 66, 92 and 96 of Section 1, Chapter 5 of the Cities and Villages Act. These various clauses are as follows:

“Forty-first.— To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure.

“Fifty-eighth.— To *regulate* places of amusement.

“Sixty-sixth.— To regulate the police of the city or village, and pass and enforce all necessary police ordinances.

“Ninety-second.— To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement

or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams and horses.

“Ninety-sixth.— To pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the City Council or Board of Trustees shall deem proper: *Provided*, no fine or penalty shall exceed \$200.00, and no imprisonment shall exceed six months for one offense.”

The first question that presents itself in the consideration of this question is whether or not fishing, boating and bathing beaches are “amusements” within the meaning of the statute. As to fishing and boating beaches, no serious question, I think, will be raised; but as to bathing beaches, it may be said that while in a way they are amusements, they also are establishments utilitarian in their nature and necessary to a certain extent to supply the actual needs of the people. While there is no doubt but that a bathing beach performs some necessary and useful functions, nevertheless it seems to me that the amusement feature really predominates, and that in the long run it may be said that a bathing beach is really a place of amusement.

While there may be considerable doubt on the question, I am of the opinion that a fishing, boating or bathing beach may be considered an “amusement” of the kind mentioned in Clause 41; that is, one of the “other . . . amusements” mentioned in the latter part of the clause. It may be urged that a strict application of the rule of *ejusdem generis* would limit the meaning of the word amusements to such as are of the same kind as theatrical exhibitions and the like. But the Supreme Court, in *Weber v. City of Chicago*, 148 Ill., 313, has not seen fit strictly to apply the rule, and it was there held that a horse race was an “amusement” within the meaning of the word as used in Clause 41.

If fishing, boating and bathing beaches are “amusements” within the meaning of the word as used in Clause 41, the validity of the proposed amendment would not be seriously questioned, since that clause gives to the City Council not only the power to “regulate” but also to “suppress and pro-

hibit." The power over such beaches would be practically as extensive as over the sale of intoxicating liquors.

Whatever the interpretation of the word "amusements" as used in Clause 41, there can be no doubt that the word "amusement" in Clause 58 includes fishing, boating and bathing beaches. Clause 58 gives to the City Council the power "to regulate" such beaches. This, I think will not be disputed. The question, then, is: Can householders' consents be required as a means of "regulation"?

The law is well settled in this State that frontage and householders' consents may be made a condition precedent to the granting of a saloon license.

Martens v. The People, 186 Ill., 314.

Swift v. The People, 162 Ill., 534.

People v. Cregier, 138 Ill., 401.

People v. Griesbach, 211 Ill., 35.

Theurer v. The People, 211 Ill., 296.

In other States an ordinance requiring a written recommendation of a saloon keeper by his neighbors of requiring a certificate signed by citizens before the issuing of a license, has been held valid.

Whitten v. Covington, 43 Ga., 421.

Re Bickerstaff, 70 Cal., 35.

So, also, statutes requiring a certain number of legal voters resident in a city or in a ward to sign a petition or consent before a saloon license is issued, it has been held to be valid.

House v. The State, 41 Miss., 731.

Rohrbacker v. Jackson, 31 Miss., 735.

Groesch v. The State, 42 Ind., 347.

State v. Brown, 19 Fla., 563.

So, also, it has been held that an applicant for a saloon license may be required to procure the recommendation of the majority of the householders and freeholders of the ward or precinct where he proposes to carry on his business before his license will issue.

Jones v. Hilliard, 69 Ala., 300.

Saloon cases in Illinois are in point, as we have seen, if these beaches are amusements within the meaning of Clause 41, and hence they are of value, in showing under what circumstances frontage and householders' consents may be required.

A case more nearly in point is *City of Chicago v. Stratton*, 162 Ill., 494, in which it was held that an ordinance making it unlawful for any person to conduct a livery stable in a block where two-thirds of the buildings are devoted exclusively to residence purposes, unless the owners of the majority of the lots in such block fronting or abutting upon such street should consent in writing to the location of such livery stable, was valid. The court held that the ordinance was within the power of the City Council as granted in and by Clause 82, Section 1, Article V, of Cities and Villages Act, which gives more power than merely the power to regulate, since it provides that the City Council shall have the power "to direct the location and regulate the use and construction" of livery stables within the limits of the city. The reasoning, however, upon which the opinion is based is similar to the line of reasoning which would uphold the ordinance now under consideration. On page 501, the court said:

"The prohibition against the location of a stable in a residence block is for the benefit of those who reside there. If those for whose benefit the prohibition is created make no objection to the location of such a stable in their midst an enforcement of the prohibition as to that block would seem to be unnecessary."

In New York, it has been held that a city having power conferred upon it "to license and regulate bill-posters . . . and to prescribe the terms and conditions upon which any such license shall be granted" may prohibit, by ordinance, the erection of billboards exceeding six feet in height without the permission of the common council, after notice in writing of the application for the permit to the owners, occupants or agents of all houses or lots within the distance of 200 feet from the place where such billboard was about to be erected.

City of Rochester v. West, 164 N. Y., 510.

The court said, page 513:

“To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint not only as to the manner of conduct of a specified business, but also as to the erection in or about which the business is to be conducted.”

The Missouri Court of Appeals has held that under a power granted to the city “to regulate livery and sales stables,” the city might, by ordinance, require the written consent of the owners of one-half of the ground upon a block where it was proposed to establish a livery stable before granting the permit for the establishing of such livery stable.

State v. Beattie, 16 Mo. App., 131.

This case, however, was disapproved by the Supreme Court of Missouri in *St. Louis v. Russell*, 116 Mo., 248, where a similar ordinance was held not to be valid because it delegated to the people of the block the right to say whether or not a livery stable should be located there. The Supreme Court of Illinois, however, in the Stratton case, distinguished the case of *St. Louis v. Russell*, saying, that the ordinance in the *St. Louis* case related to the entire city and not to those particular portions of the city used for residence purposes. The amendment which we have now under consideration applies only to those portions of the city used for residence purposes and is not open to the objection which was made against the ordinance in the *St. Louis* case.

There remains, of course, the question of reasonableness. The amendment as drafted proposes to require the consent of all householders living within six hundred and sixty-six (666) feet of the center of the principal structure located on the proposed beach. In most cases, there is a considerable distance from the beach to the nearest street in which there are any buildings and it seems to me that the provision in the amendment is not unreasonable.

Summarizing: In my opinion, boating, fishing and bathing beaches are amusements; the power to regulate them, granted by the statute to the City Council, includes a reasonable power to restrict their location within residence districts;

the restrictions contained in the proposed ordinance are not unreasonable, and the ordinance, as a whole is valid.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

APRIL 29, 1908.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On March 23, 1908, your honorable body passed the following order:

- “ORDERED, That the Corporation Counsel be, and he hereby is, directed to prepare an ordinance to be submitted at the next Council meeting, requiring the elevated railroad companies to store their cars on lands other than in residence districts; the present method of storing cars causing annoyance to persons and damage to property.”

An ordinance of the character called for by this order necessarily involves the question of municipal control over, and the regulation or abatement of, nuisances arising from any particular trade or business.

By act of the Legislature the City Council may declare and define “nuisance.” The act reads:

“The City Council shall, by ordinance, be empowered to declare and define nuisances and abate the same, and shall have the power to regulate the location and conduct of hospitals and infirmaries.”

(Sec. 8, Par. 193, at Chap. 24, page 321; Hurd’s R. S., 1906.)

The power thus vested in your honorable body has heretofore been exercised, and there is now a general ordinance declaring and defining nuisances, and providing that in all cases where no provision is therein made defining what are nuisances and how same may be removed, abated or prevented, those offenses which are known to the common law and the

statutes of Illinois as nuisances, may, if they exist within the city limits or within a mile thereof, be treated as such.

The power of your honorable body to regulate the location and conduct of any business not a nuisance *per se*, and which is separate from and independent of the city's business, is limited by the act to the location and conduct of hospitals and infirmaries.

The question treated of in the order under consideration falls within neither. Nor is it a nuisance *per se*.

The City Council has been given express authority to regulate the use of space over streets, etc., which is as follows:

"The City Council may also regulate the use of space over the streets, alleys and public places of the city, and upon payment of proper compensation to be fixed by ordinance may permit the use of the space more than 12 feet above the level thereof."

(Sec. 5, Par. 193aq, page 321; Hurd's R. S., 1906.)

Our Supreme Court has approved of this delegation of power in the case of *Spiegler v. City of Chicago*, 216 Ill., 114, and cases therein cited, and the ordinance sent you herewith is in consonance with that opinion.

The elevated railways of Chicago are operated by virtue of ordinance. The ordinance is a contract between the city and the company operating the railway. It is proper for the city to regulate the use of the space over the streets, alleys and public places of the city used by the various elevated railways, and it is doing so in a measure by provisions in its ordinances under which the respective companies are now operating. But the order passed by your honorable body, and which forms the subject matter of this opinion, seeks to have the city do more. The points at which elevated railroad companies store their cars are owned by the companies. They constitute no part of the space over the streets, alleys and public places of the city. They are a part of the companies' right of way. In the well considered case of *St. L., K. C. & C. Railroad Company v. Wabash Railroad Company*, 152 Fed. Rep., page 849, the words "right of way" were defined as follows:

"The ordinary signification of the term 'right of way,'

when used to describe land which a railroad corporation owns or is entitled to use for railway purposes, is the entire strip or tract of land it owns or is entitled to use for this purpose, and not any specific or limited part thereof, upon which its main track or other specified improvements are located."

Joy v. St. Louis, 138 U. S., 1.

Territory of New Mexico v. United States Trust Co., 172 U. S., 171.

C. & A. R. R. Co. v. People, 98 Ill., 360.

Lake Erie & Western R. R. Co. v. Middlecoff, 150 Ill., 27.

Pfaff v. T. H. & I. R. R. Co., 108 Ind., 144.

It is apparent, then, that the yard, or car storing place, of these companies is a part of their right of way, and an ordinance of the character required by this order would attempt to regulate the use of their property used in the prosecution of their business. The only pretext upon which the city could assume to control or regulate this matter would be by declaring it a nuisance.

"A city can not declare a particular business a nuisance in a summary way and of its pleasure."

Yates v. Milwaukee, 77 U. S., 505.

And where, as in the present case, there is no contention that the business is a nuisance *per se*, it is said:

"To make the thing a nuisance it ought to be of such a character as will hurt or annoy in the legal sense of those words."

Ruff v. Phillips, 50 Ga., 131.

The complaint embodied in the order of your honorable body does not appear to be founded on the claim that the business comes within the class designated "noxious and injurious," nor as to the manner of conducting the yard.

It has been held that a mayor and council, under a grant of power to declare nuisances, have no authority, by ordinance, to declare an existing livery stable a nuisance, such an act being a deprivation of property without due process of law and an invasion by the Legislature of the powers of the judicial department of the Government.

State v. Bettie, 16 Mo. App., 131.

It is true a railroad company can claim no greater rights in the use of its property than a private citizen would have under like circumstances.

I. C. Ry. Co. v. Grabill, 50 Ill., 241.

Snell v. Buresh, 123 Ill., 156.

But —

Private persons who sustain special damages from the acts of the corporation can recover therefor.

Stone v. F. P. & N. W. R. R. Co., 68 Ill., 395.

Wood, on Nuisance, p. 789, Sec. 751; p. 792, Sec. 752.

The various elevated railroads operating in the City of Chicago require numerous cars in the conduct of their business, and, as is well known, there are certain hours in the day when they are urgently in need of more cars than at any other given time of the day. A yard or storing place, then, becomes absolutely necessary for the proper storing of the cars when out of use, that they may be conveniently and readily accessible when the known exigencies of their business require them. The companies, however, should so conduct these yards as to give the least possible annoyance to adjacent residents.

Wiley, et al., v. Elwood, 9 L. R. A., 726.

I am of the opinion that unless the manner of conducting these yards can be shown to constitute a nuisance, the city has no power to interfere. The damage to the adjacent property named in your order is a purely private matter between the individual and the road for which the law furnishes him an adequate remedy and ample redress.

Yours very truly,

GEO. M. BAGBY,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

APRIL 30, 1908.

FRANK I. BENNETT, ESQ., Chairman, Finance Committee.

Dear Sir:

Replying to yours of April 17, in which you ask for an opinion from this office in relation to city's liability for injuries sustained by M. J. Woodhull from bullet fired by policeman while at revolver practice, permit me to say:

It is well settled law in this State that the city is not liable for the acts of its police officers.

Blake v. City, 49 Ill. Ap., 543.

Wilcox v. City, 107 Ill., 334.

Craig v. City, 180 Ill., 154.

Tollefson v. Ottawa, 228 Ill., 134.

I am, therefore, of the opinion that the city is not liable for the injuries complained of.

All of which is respectfully submitted.

Yours very truly,

FRANK L. CHILDS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

MAY 1, 1908.

FRANK L. RACE, ESQ., Alderman, Thirty-fifth Ward.

Dear Sir:

Your verbal inquiry as to the power of the City Council to require the Lake Street Elevated Railroad Company to elevate its tracks from Fifty-second street to the western limits of the city, having been referred to me for an opinion, permit me to say, Paragraph 221, Chapter 114 of the Revised Statutes of the State of Illinois, provides that:

“Any company which has been or shall be incorporated under the general laws of the State for the purpose of constructing, maintaining and operating any elevated way or conveyor, shall state in its Articles of Incorporation the places from and to which it is intended to construct the proposed elevated way or conveyor.”

The Articles of Incorporation of the Lake Street Ele-

vated Railroad Company contain a statement of its termini as from Canal street to the western limits of the city, along and over Lake street. The company is organized under the general laws of the State. At the time of its incorporation, and on December 28, 1888, which latter was the date of the first ordinance from the City of Chicago granting the company the permission and authority to construct its elevated structure and operate its cars thereon, the western limits of the City of Chicago on Lake street, were Fifty-second street. Since then the Town of Austin has been annexed to the city and the western limits on Lake street have been extended to Austin avenue. I am of the opinion, however, that the statement made in the Articles of Incorporation as to the termini is a substantial compliance with the statutory requirement and is legally sufficient to include or comprehend the present city limits.

Lieberman v. C. R. T. R. R. Co., 141 Ill., 140.

But the General Assembly has passed an act relating particularly to elevated railroads, which imposes certain conditions precedent to the construction and maintenance of such a road. It is as follows:

“That no person or persons, corporation or corporations, shall construct or maintain any elevated railroad or any elevated way or conveyor to be operated by steam power, or animal power or any other motive power, along any street or alley in any incorporated city or village, except by the permission of the City Council or Board of Trustees of such city or village, granted upon a petition of the owners of the lands representing more than one-half of the frontage of the street or alley, OR OF SO MUCH THEREOF AS IS SOUGHT TO BE USED FOR SUCH ELEVATED RAILROAD or elevated way of conveyor; and the City Council, or Board of Trustees, SHALL HAVE NO POWER TO GRANT permission to use any street or alley, OR PART THEREOF, for any of the purposes aforesaid, except upon such petition of landowners as is herein provided for.”

Par. 226, chap. 114, p. 3333, S. & C. R. S., Vol. 3.

This paragraph, in terms, denies to the City Council the power and authority to permit, therefore to require, the com-

pany to build an elevated structure at the point in question, except upon petition to the council of the owners of the land representing more than one-half of the frontage of so much of the street as is sought to be used for the elevated railroad. Paragraph 227 of the same act reads:

“When the street or alley, OR PART THEREOF, sought to be used for any of the purposes aforesaid, shall be more than one mile in extent, no petition of landowners shall be valid for the purposes of this act, unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and fractional part of a mile, of such street or alley, or of the part thereof sought to be used for any of the purposes aforesaid.”

This paragraph is self-explanatory.

The actual distance from Fifty-second street to Austin avenue, or of the city's western limits on Lake street, is 5304.77 linear feet. It is, therefore, but a simple mathematical calculation to see that the part of Lake street now sought to be used for the purpose of constructing and maintaining the elevated structure under consideration is one mile and 24.77 feet.

I am of the opinion, therefore, that as a condition precedent to any action being taken by the Council, a proper petition should be presented to that body, signed by the owners of the land representing more than one-half of the frontage on Lake street in the mile and the majority of the same in the fraction of a mile from Fifty-second street to Austin avenue, or the city limits, unless the petition presented to the Board of Trustees of the Town of Austin was for an elevated structure, in which event there would be no need for a petition at this time, but in the absence of it a petition of the character required by the preceding paragraph would be indispensable, as without such a petition so signed the City Council is expressly denied the power to act at all in the matter.

Assuming this legal condition precedent to be fully and properly complied with, the charter powers of the City Council obtain and control, subject to the legal rights of the road as secured by ordinance.

The charter of the City of Chicago provides that the City Council shall have power :

Clause 7 — “to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, avenues, etc.”

Clause 9 — “to regulate the use of the same.”

Clause 10 — “to prevent and remove encroachments or obstructions upon the same.”

Clause 15 — “to prevent injury to any street, avenue, etc.”

Clause 20 — “to regulate traffic, etc., upon the streets, etc.”

Clause 25 — “to provide for and change the location, grade and crossings of any railroad.”

In the case of *Lieberman v. C. R. T. R. R. Co.*, 141 Ill., 140, our Supreme Court, construing the term “any railroad,” held that it included an elevated railroad.

Clause 75 — “to declare what shall be a nuisance and to abate the same.”

Clause 95 — “to pass all ordinances, rules, and make all regulations, proper or necessary to carry into effect the powers granted to cities, etc.”

The policy of the City of Chicago, in so far as it relates to The Lake Street Elevated Railroad Company, may be readily ascertained by reference to the city’s first ordinance dealing with the company. This ordinance bears date December 28, 1888, and reads, in part, as follows :

“Section 4. The permission, authority and privileges granted are upon the express conditions that the entire design and plan of the said railroad, FROM ITS EASTERN TO WESTERN TERMINUS, shall be that of an elevated structure, etc.

“Section 5. The General plan or plans of the structure shall be of an elevated railroad, etc. . . .

“Section 15. The privileges hereby given are subject to all general ordinances of the City of Chicago now in force or hereafter to be passed in reference to elevated railways, and the City of Chicago reserves to itself the right (among others named) to impose such regulations as the Council may deem

necessary for the protection, convenience and safety of the public."

Subsequent ordinances, in so far as they are germane to the present inquiry, are substantially the same.

At the time of the passage of these ordinances, the *locus in quo* was outside and beyond the limits of the City of Chicago and within the Town of Cicero, and on December 19, 1898, the Board of Trustees of the Town of Cicero granted permission and authority to the Cicero & Harlem Railway Company, its successors, etc., to build, construct, maintain and operate a line of railroad, consisting of two tracks, over, upon and along Lake street from Robinson avenue, or West Fifty-second street, connecting there with the elevated railroad of the Lake Street Railroad Company of Chicago; thence westwardly along and upon South Boulevard continuously to the West limit of the Town of Cicero, viz.: Seventy-second street, or Harlem avenue. This ordinance further provided that,

"Section 3. The permission, privileges and authority hereby granted are upon the express understanding and condition that the said railroad tracks between Fifty-second street on the east and near to Willow avenue on the west shall be laid on an elevated structure by an incline or gradient. The tracks shall be elevated above the surface of the street from Fifty-second street on the east to near Willow avenue on the west, and from said Fifty-second street by a gradient to the surface of the street, and thence to Seventy-second avenue as a surface railroad, with the tracks supported on ties.

"Section 3 (e). The general plan of structure between Fifty-second street and a point between Fifty-third avenue and Willow avenue shall be that of an elevated railroad."

If the general plan of the structure between Fifty-second street and a point between Fifty-third avenue and Willow avenue was granted by the Board of Trustees of the Town of Cicero upon proper petition, and the names thereon represented the then owners of the land representing more than one-half of the frontage on Lake street in the mile from Fifty-second street west, then, as to that mile, there exists no legal

necessity for another petition, as the former petition must, under the statute hereinbefore quoted, have related to an elevated railroad for the distance such now exists.

The ordinance in force and effect in the Town of Cicero at the time of Austin's annexation to Chicago controls this matter to the extent that an ordinance can control. The true question now to be considered is, whether there is anything in the City of Chicago's policy toward this road as indicated by its own ordinances and the requirement to elevate its tracks between the points hereinbefore indicated, that materially conflicts with any legal right secured to the road by Cicero's ordinance.

It seems perfectly clear to me that the policy of the City of Chicago as evidenced by the various ordinances its City Council passed in relation to the business of the Lake Street Elevated Railroad Company was to secure the establishment of an elevated structure over, along and upon Lake street to the western limits of the city, and there is nothing in the ordinance of the Town of Cicero securing to the said road any legal rights in conflict with this policy. It would seem to me this question is reduced to the simple proposition of whether the charter powers of the City Council are sufficient to permit it or to authorize it to require the road to build and construct an elevated structure between the points heretofore named herein and to operate its cars thereon. I am of the opinion, the city has ample power in the premises. Among the charter powers of the Council over streets, etc., named in Clause 7 of Article V, Chapter 24, are those to alter and otherwise improve same. Both of these terms are very broad in their meaning and confer very large discretionary power upon the city's legislative body.

While the various other quotations made herein from the same delegation of power indicate very clearly to my mind an intention upon the part of the General Assembly to give the City Council an almost plenary power over the streets, I am fully convinced that the question before us may be adequately and satisfactorily determined by a consideration of but two, namely: Clauses 9 and 75. The first reads: "to

regulate the use of same," and the second, "to declare what shall be a nuisance and to abate the same."

Under a statute in the State of Connecticut providing for a petition alleging that public safety requires an alteration in a railroad crossing, its approaches, method of crossing, the substitution of another for the existing one, etc., the substance of which provision of said statute is comprehended in Clause 25, Article V, Chapter 24, Revised Statute of Illinois, which reads: "The City Council, etc., shall have power to provide for and change the location, grade and crossings of any railroad," the Supreme Court of the United States, speaking through Justice Fuller, said:

"It must be admitted that the act of June 19, 1899, is directed to the extinction of grade crossings as a menace to public safety, and that it is therefore within the exercise of the police power of the State."

N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556, at page 566 of opinion.

In *Woodruff v. Catlin*, 54 Conn., 277, the Court, by Justice Pardee, said:

"The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The Legislature having determined that the intersection of two railways with a highway in the City of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the Legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

This excerpt is quoted with approval by the Supreme Court of the United States in the *N. Y. & N. E. R. R. Co. v. Bristol*, *supra*.

Again, in the 58th Conn. 552, the court held that grade crossings were in the nature of nuisances which it was competent for the Legislature to cause to be abated and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all, of the expense of such abatement. And in the *N. Y. & N. E. R. R. Co. v. Bristol*, *supra*, the court further said:

“It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process of the equal protection of the law by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of protection can not be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.”

Citing:

Beer Co. v. Mass., 97 U. S., 25.

Fertilizing Company v. Hyde Park, 97 U. S., 659.

Barbier v. Connolly, 113 U. S., 27.

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650.

Mugler v. Kansas, 123 U. S., 623.

Budd v. New York, 143 U. S., 517.

The power delegated to the City Council in Clause 9, of Article V, Chapter 24, which is, “to regulate the use of the streets,” has been held to be a continuing one.

N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556.

Baltimore v. Baltimore & Trust Co., 166 U. S., 673.

Wabash Railroad Co. v. Defiance, 167 U. S., 88.

Nor does the fact that the city has given its permission to a railway company to lay its rails upon or across a certain street deprive it of the power to improve and control such

street, and adopt all needful rules and regulations for its use and management.

C. B. & Q. Railroad v. Quincy, 136 Ill., 563.

Wabash Railroad Co. v. Defiance, 167 U. S., 88, at page 102 of opinion.

And the principle is sustained, endorsed and approved in a very recent expression of the Supreme Court of the United States, speaking through Justice Day, in the case of the *N. P. Ry. Co. v. The State of Minnesota*, not yet reported except in the April 1st advance reports of the U. S. Supreme Court.

In view of the known fact that the completion of the elevation of the Northwestern Railway's roadbed and tracks at the point in question will result in making the Lake Street Elevated Railway crossing at Willow avenue extremely dangerous and unusually hazardous, I am of the opinion that the City Council has full power and authority, under its charter powers (subject to the conditions hereinbefore indicated), to require the Lake Street Elevated Railroad Company to place an elevated structure between Fifty-second street and the city's western limits on Lake street, of the same general character as that of the said company's structure east of Fifty-second street, and to operate its cars thereon.

Yours very truly,

GEORGE M. BAGBY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

MAY 8, 1908.

FRANCIS W. TAYLOR, Esq., Alderman, Twenty-first Ward.

Dear Sir:

Your letter of May 5, addressed to the Corporation Counsel, asking for an interpretation of the statutory provisions concerning the alienation of real and personal property by cities, has been by him referred to me.

The specific question which you asked is, whether or not the "Act to authorize cities and villages to convey any real

or personal estate, or their right and title therein, when the same shall be no longer necessary for, or profitable to, or its longer retention be for the best interests of such city or village'' applies to the contemplated contract for the wrecking of the present City Hall building and the sale of the materials therein.

The Act is as follows:

''Section 1. That any city or village incorporated under any general or special law of this State, which shall have acquired or hold any real or personal estate for any purpose whatsoever, is hereby authorized and empowered by ordinance passed by three-fourths of the members of the city council of any such city, or of the board of trustees of any such village, at any regular or at any special meeting called for such purpose, to sell such property when the same shall, in the opinion of such majority of such city council or board of trustees, be no longer necessary, appropriate or required for the use of such city or village, or profitable to, or its longer retention be for the best interests of such city or village.

''Sec. 2. Such ordinance shall specify the location of such real or personal estate, and the use thereof, of whatever kind the same may be, and before any sale shall be made under or by virtue of any such ordinance, by the city council of any such city, or the board of trustees of any such village, such ordinance and proposal to sell shall be published in one of its daily or weekly papers for a period of not less than sixty days, and if no paper be published in such city or village, then it shall be published in some paper of general circulation in this State nearest to such city or village. Such notice shall contain an accurate description of such property, the purpose for which it is used, and at what meeting the bids will be considered and opened, and shall advertise for sixty days for bids therefor. All such bids shall be opened only at a regular meeting of such city council or board of trustees, and shall be accepted only upon a vote of three-fourths of the members of such city council or board of trustees: PROVIDED, HOWEVER, that the city council or board of trustees may by a majority vote reject any and all bids.

“Sec. 3. Upon any bid having been accepted and the purchase price duly paid or secured, the mayor and city clerk, or the president of the board of trustees and the clerk of such board, shall have the power to convey such real or personal estate and transfer the same to such party or parties whose bids have been accepted, by proper deed or deeds of conveyance, stating therein the price therefor, with the seal of the corporation.”

Starr & Curtis' Ann. Ill. Statutes, 1896, Vol. 1, pages 815-16.

The real question is whether or not the contemplated contract is really a *sale* of property belonging to the city. It may be said that the main thing desired and the real object of the contract is the wrecking of the present City Hall, and that the sale of materials is only an incidental and not the essential part of the proposed transaction. It does not seem to me, however, that it would be safe to take the position that the sale is only incidental. However the transaction is considered, and whatever the amount of the bid on the proposed contract may be, the fact remains that much valuable property belonging to the city, and for which there is no further use, is to be sold and the money obtained therefor applied to pay for the cost of wrecking the building. I am, therefore, of the opinion that the provisions of the Act in question should be followed, and that an ordinance should be passed in accordance with the provisions of the Act and that such ordinance and the proposal to sell the materials should be published for a period of sixty days.

In Dillon on Municipal Corporations, 4th ed. Vol. 2, Sec. 578, it is said: “If the charter or constituent act of the corporation prescribes a particular *mode* in which *the property* of the corporation *shall be disposed of*, that mode must be pursued.” There is no doubt but that the Act which we have under consideration has the same force and effect as if it were a part of the Cities and Villages Act and hence a part of the Charter of the City of Chicago. The Act in question has not, as far as I know, been passed upon by our Supreme Court, but similar questions were raised in a series of important cases in the Supreme Court of California, known as the

“City Slip Cases,” in which it was held that the city officials in selling city property must conform strictly to the terms of the charter requiring an ordinance to be passed and an advertisement of the time, place and sale be published.

McCracken v. San Francisco, 16 Cal., 591 (1860).

Grogan v. San Francisco, 18 Cal., 590 (1861).

Pimental v. San Francisco, 21 Cal., 351 (1863).

Herxo v. San Francisco, 33 Cal. 134 (1867).

This department will prepare an ordinance and endeavor to have it ready so that it may be placed before the Council at its meeting on Monday, May 11, 1908.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

JUNE 4, 1908.

WILLIAM F. LIPPS, Esq., Chairman, Track Elevation Committee.

Dear Sir:

I have referred to me by your committee the opinion of Leon Hornstein, Esq, rendered May 23, 1906, as to the rights of the Chicago, Milwaukee & St. Paul Ry. Company in Bloomingdale road, with a request to reëxamine this opinion and render such additional opinion upon the subject as the conditions warrant.

Mr. Hornstein's opinion fully sets forth and passes upon the conditions east of Western avenue, and also that portion where the tracks are elevated beginning at Lawndale avenue and running westward. This leaves the portion in dispute as to that part of Bloomingdale road occupied by the tracks of the Company between Western avenue and Lawndale avenue.

On page 3 of Mr. Hornstein's opinion it is stated that:

“The company bases its claim in Bloomingdale road west of Western avenue on an ordinance which was before the Board of Trustees of the Village of Jefferson on February

23, 1884. It is contended by the company that the ordinance was duly passed and accepted, though it is admitted that the record does not show it.”

The question in doubt seems to be as to whether the passage of an ordinance must be shown from the journal of the Municipal Board.

Since Mr. Hornstein rendered his opinion this question has been passed upon by the Supreme Court of this State in *People ex rel. Cline v. Rhodes*, 231 Ill., 270.

In that case it was contended that the failure of the minutes of the Village Board of the Village of Atwood to show the adoption of an ordinance providing for the disconnecting of certain territory from the Village, was not conclusive that such an ordinance was not adopted at the meeting of the Village Board. The Supreme Court, in passing upon the question, said:

“We can not agree with this contention. Section 12 of Article 3 of the Cities and Villages Act requires the city council or village board to keep a journal of its proceedings. Section 13 provides that the yeas and nays shall be taken upon the passage of all ordinances and entered on the journal of the council or village board’s proceedings, and the concurrence of a majority of all the members elected is necessary to the passage of an ordinance. If the taking of the yeas and nays is not mandatory where the journal shows a majority of all the members of the council or board were present and that the ordinance was unanimously adopted, the requirement that the concurrence of a majority of all the members elected is necessary to the adoption of the ordinance is mandatory. (*Barr v. Village of Auburn*, 89 Ill., 361.) It has been repeatedly held in this and in other States that an act of the legislature properly signed is not conclusive that it was passed by a constitutional vote, but that this may be tested by the journals of the two houses, and if it does not appear from the journals that the act received the necessary vote it is not a valid act. The same rule is applicable to ordinances. No ordinance can be valid unless it shall have received the concurrence of a majority of all the members of the city council or village board elected, and the evidence of

this must be shown by the journal. It can not be supplied by parole. (*People v. McCullough*, 210 Ill., 488.)”

We are, therefore, of the opinion that the alleged ordinance of the Village of Jefferson of February 23, 1884, was void, and that the Railway Company acquired no rights thereunder to lay or maintain its tracks in that portion of Bloomingdale road west of Western avenue.

We are unable to find any other ordinance, either of the City of Chicago or of the old Village of Jefferson which gives the Railway Company any right to lay its main tracks in Bloomingdale road between Western avenue and Lawndale avenue.

Yours very truly,

ROBERT N. HOLT,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JUNE 15, 1908.

GEORGE M. SHIPPY, Esq., Superintendent of Police.

Dear Sir:

Your communication of 11th instant, attaching reports from Inspector Hunt and Captain McWeeney, relative to gypsy camp at Sixtieth street and Cottage Grove avenue, which, it is claimed, are kept and maintained in an insanitary condition, has been referred to me for an opinion as to your jurisdiction over the same.

Relative to the duties of the General Superintendent of Police to abate nuisances, it is provided in Section 1739 of the Revised Municipal Code of Chicago of 1905 as follows:

1739. “He shall take notice of all nuisances, impediments, obstructions and defects in the streets, avenues, alleys and public places of the city, and shall remove the same, or *cause immediate notice thereof to be given to the proper officer* whose duty it may be to take measures in relation thereto, according to the ordinances of the city.”

Section 1029 provides as follows:

“It shall be the duty of the Commissioner of Health to

enforce all the laws of the State and the ordinances of the city and all rules and regulations of the department of health, in relation to the sanitary condition of the city, and cause all nuisances to be abated with all reasonable promptness."

Section 1201 of Article 19, in relation to nuisances contained in the chapter on health, provides as follows:

"It shall be the duty of the Commissioner of Health to serve a notice, in writing, upon the owner, occupant, agent or person in possession, charge or control of any lot, building or premises in or upon which any nuisance may be found, or who may be the owner or cause of any such nuisance, requiring them or either of them to abate the same in such manner as he shall prescribe, within a reasonable time; Provided, that it shall not be necessary in any case for the commissioner to specify in his notice the manner in which any nuisance shall be abated, unless he shall deem it advisable so to do; *and such notice may be given or served by any officer who may be directed or deputed to give or make the same;* and if the person so notified shall neglect or refuse to comply with the requirements of such order by abating such nuisance within the time specified, such person shall be subject to a fine of not less than \$5 nor more than \$50 for every such violation, and it shall be the duty of such officer to proceed at once, upon the expiration of the time specified in such notice, to cause such nuisance to be abated; Provided, further, that whenever the owner, occupant, agent or person in possession, charge or control of premises, in or upon which any nuisance may be found, is unknown or can not be found, the said commissioner shall proceed to abate such nuisance without notice; and in either case the expense of such abatement shall be collected from the person or persons who may have created, continued or suffered such nuisance to exist."

It is further provided in Sections 1204, 1206, 1207 and 1208 as follows:

"Any store, house, factory or building, *or structure of any kind, or any grounds or premises* kept, permitted or suffered to remain for two hours in such condition as to be offensive to the neighborhood, dangerous or prejudicial to the public health, is hereby declared a nuisance, and the

owner, agent or person in possession, charge or control of such store, house, factory, building or structure, or grounds or premises, shall be fined not less than \$25 and not exceeding \$100 for each such offense, and a further penalty of \$25 for every day such nuisance shall continue after the first offense.

“In all cases where a nuisance shall be found in any building or upon any ground or other premises within the jurisdiction of the city, twenty-four hours’ notice may be given in writing, signed by the Commissioner of Health or by the acting health officer, to the owner or occupant or person in possession, charge or control of such building or other premises where he is known and can be found, to remove such nuisance, and in case of his neglect or refusal to abate the same in accordance with such notice he shall be chargeable with the expenses which may be incurred in the removal thereof, to be collected by suit or otherwise, in addition to the fine or penalty.

“Whenever any nuisance shall be found on any premises within the city the Commissioner of Health is hereby authorized in his discretion to cause the same to be summarily abated in such manner as he may direct.

“In all cases where no provision is herein made defining what are nuisances and how the same may be removed, abated or prevented in addition to what may be declared such herein, those offenses which are known to the common law of the land and the statutes of Illinois as nuisances may, in case the same exist within the city limits or within one mile thereof, be treated as such, and proceeded against as is in this article provided, or in accordance with any other provision of law.”

It would appear that the Commissioner of Health by the ordinances of the City of Chicago has been given complete jurisdiction over nuisances of all kinds, and is given authority to invoke the aid of the police department to abate the same.

If the tents, or the premises upon which they are situated, are kept and maintained in an insanitary condition, the Commissioner of Health has authority to require the owner or occupant to put the same in a sanitary condition, and upon

his failure to do so may take such steps as he deems necessary for that purpose.

I am, therefore, of the opinion that it is the duty of the Commissioner of Health to act in the premises in conjunction with your department.

Yours very truly,

GEORGE E. DIERSSON,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

JUNE 20, 1908.

WILLIAM CARROLL, Esq., City Electrician.

Dear Sir:

We are in receipt of your letter dated June 18, 1908, asking our opinion on the question whether a contract for bare and weatherproof copper wire may be awarded the Central Electric Company as lowest bidder in the face of a protest from one of the other bidders.

It appears that, taking as a whole their proposal for all of the three styles of wire specified, the bid of the Central Electric Company is the lowest, and that, although the right is reserved to the city in the specifications (page 4) to accept any part of a bid, the prices submitted by this company are conditional on its being awarded the entire contract.

On page 3 of the specifications, under the head of "Proposals," it is stated that the bidder must not only submit samples, but also name the manufacturer who will furnish the wire, and it is on account of the failure of the Central Electric Company to give this information that one of their competitors has protested against the acceptance of their bid.

In general, the courts have held that the object of a law requiring the letting of public contracts to the lowest responsible bidder is to secure free and open competition in the letting of such contracts, and for this reason the award of a contract under circumstances which tend to stifle competition will not be upheld.

Siegel v. City of Chicago, 223 Ill., 428, page 433 and cases cited.

Aside from this restriction, however, the officer authorized to make the award on behalf of the city is vested with a broad discretion in so doing, the rule having been stated as follows in *Johnson v. Sanitary District of Chicago*, 163 Ill., 285, on page 287:

"The duty of examining the proposals, determining the responsibility and awarding the contract is judicial in its nature and character, and the awarding the contract is a judicial act, which is not within the province of the courts to control by *mandamus* or mandatory injunction." Citing numerous authorities. See also:

Kelly v. Chicago, 62 Ill., 279.

Anderson v. St. Louis Public Schools, 26 L. R. A., 707.

We are given to understand as, indeed, is apparent from the specifications themselves in this case, that the requirement for bidders to name the manufacturer who is to furnish the wire is, like several other provisions, intended merely to give the city's representatives the fullest possible information concerning the wire which it is proposed to deliver. A strict enforcement of this requirement can hardly affect the competition among bidders or the price or quality of the goods, especially where, as is the case here, the samples of wire and the figures submitted by the lowest bidder have satisfied you that this company is capable of furnishing wire which will meet the city's specifications at the price quoted.

The fact that a failure to name the manufacturer, when required, has previously been ignored in awarding contracts is not material except as showing that it is possible to award contracts intelligently without insisting on a compliance with this provision.

For the above reasons we would say that while you may properly reject bids which do not specify the manufacturer of the wire to be furnished, you are also authorized in your discretion to waive this requirement and award the contract to the lowest responsible bidder who has by other means shown to your satisfaction that he will deliver wire of the grades specified. In other words, while the bid is informal

and could be rejected for that reason, the informality does not in this case interfere with competition for the contract or in any way affect the public interests and may therefore be disregarded.

Yours very truly,
 WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:
 EDWARD J. BRUNDAGE,
Corporation Counsel.

JUNE 25, 1908.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

I am directed by the Corporation Counsel to reply to your favor of the 24th inst., relative to the above entitled matter, and therefore beg to advise you:

First. That every person, firm or corporation, their agents or employees, *whether residents or nonresidents* (see subhead "b"), are required to secure from the city a license before they can drive or propel any wagon or other vehicle engaged in the transportation of persons or property on the streets, avenues or alleys of the city.

(a) The ordinance, however, does not apply to street cars running on metallic rails, bicycles, motorcycles, push carts, wheelbarrows or perambulators.

(b) Whether the ordinance will be enforced against non-residents who are passing through the city or those coming from suburbs is left for the administration to determine.

When the ordinance was under consideration there was some considerable sentiment toward expressly excluding non-residents, on the theory that if we required a license for these people to travel upon the streets of Chicago, they would retaliate by passing local ordinances making it necessary for citizens of Chicago to take out licenses when passing through their city, and the result might be that the citizens of Chicago who desired to travel through the State might be required to expend a large sum of money in order to take a single trip outside of the city, and inasmuch as Chicago was the pioneer

under the wheel tax statute, it seemed advisable to draft the ordinance in such a way so that we could enforce it as a retaliatory measure on nonresidents, provided other cities passed ordinances requiring a license fee from the citizens of Chicago.

I think you will find quite a pronounced sentiment at an early date in favor of requiring the truck farmers to comply with the law. There are hundreds of them, and some wards of the city are overrun by this particular class of traffic. The administration might determine without any fear of particular embarrassment, that these farmers should pay the license fee, because they are not residents of other towns, cities or villages and there would be no particular danger of their home municipality passing an ordinance similar to ours and exacting such a fee from our citizens. In this connection, I wish to interpolate, that these farmers perform quite a valuable service to the City of Chicago during the summer months by hauling manure out of the city on their return trip and thereby relieving the Health Department of the necessity of looking after it.

Second. This ordinance can only be enforced against wagons or other vehicles *while upon* the streets, avenues and alleys of the city, and does not apply to vehicles upon private premises.

Third. Upon the issuance of a license the City Clerk will deliver a metallic plate bearing a number and the name of the class to which said wagon or vehicle belongs, and the year for which the license is issued; and it is the duty of the owner of such vehicle to affix such plate in a *conspicuous place* upon the right hand side of his wagon, vehicle or horse where it can be readily seen; and it is unlawful for any wagon or vehicle, although duly licensed, to be upon the streets of the city unless the plate is attached, as herein indicated.

(a) Owners of automobiles are not required to have a metal plate upon their machines.

We omitted the requirement for tags upon automobiles for fear we might conflict with the State statute. Furthermore, as the only purpose of the tag is to facilitate the collection of the license fee, it occurred to us, that inasmuch as all

automobiles have a State number, it would be a very easy matter to secure from the Secretary of State a list of all automobile owners living within the City of Chicago and then check up with the list of licenses issued to automobile owners and locate the delinquent ones, as the result of clerical work in the office, rather than police surveillance.

Fourth. It is not necessary for any wagon or vehicle to have the metal plate attached to it, except when actually in use upon the streets of the city. This will make it possible for owners to transfer their tags from one wagon or set of harness to another; provided, only, that all wagons or vehicles that are upon the street, exclusive of automobiles, have the metallic plate attached in a conspicuous place; and provided, further, that the tag is of the appropriate class and the particular kind which belongs to that particular vehicle. For illustration: A four-horse license tag can not be used for a two-horse vehicle, and a two-horse license tag can not be used for a one-horse vehicle.

(a) Explanatory of the transferable tag, and in order that you may fully understand why provision was made for it, I beg to advise you that this was not in the original ordinance, and was an amendment suggested during the deliberations of the Judiciary Committee for the purpose of taking care of the following situation.

Lumber dealers and coal dealers and many express and van men usually use in their business more wagons than they have teams to operate. These extra wagons are loaded in the yards while the teams are delivering about the city, and when a driver returns to the yard, instead of waiting for the wagon he is hauling to be reloaded, he hooks on to one of the extra wagons, which has in the meantime been loaded, and proceeds with the delivery, leaving the wagon which he had just previously had upon the streets in the yard for reloading, and is, therefore, not in use upon the highways of the city.

It also appears that feed men have a particular kind of wagon to deliver grain in, and a certain other kind of wagon to deliver hay; but the number of wagons which are actually in use upon the streets is limited by the number of teams a man uses in his business.

The entire matter narrows itself down simply to this: The City of Chicago is only concerned with the vehicles *actually in use upon the streets*, and as long as those wagons have tags, the city has no concern with the other vehicles the owner may have upon his private premises.

Fifth. The ordinance also provided "that all licenses shall expire on the 30th day of April following the date of issue and when issued for a period of less than one year the fee to be paid for the unexpired license period shall be the proportionate part of the annual rate fixed by the ordinance, but no fee shall be less than one-fourth of the annual rate."

The object of this provision was to cover the new vehicles which an owner might purchase during the license period, and which he might desire to use upon the streets of the city before the expiration of the then existing period; but this should not be applied to owners who come in at this time, although two months of the license period have practically expired, unless it is specifically shown that the vehicles are new ones, and have been purchased after May 1, because owners can not be permitted to take advantage of the courtesy which we have extended to them in not enforcing the collection of the license fee pending the decision of the Supreme Court, and this same principle should be applied in the future when an owner has been dilatory in filing his application for a license or probably does not apply until forced to do so by the Police Department. Although some considerable period of the license may have expired, still he should be compelled to pay the full fee.

Sixth. The revenues derived from such license fees must be kept in a separate fund and used only for paying the costs and expenses of street or alley improvement or repair. No portion of the moneys can be expended toward defraying any expenses which may be necessarily or incidentally expended in the collection of the fund or the enforcement of the ordinance.

Seventh. There will doubtless be many exceptional cases which can not be anticipated, and when they arise I respectfully suggest that the matters be referred to this department.

There will also be some rare instances where a peddler

or teamster may be in the habit of always driving a team in connection with his work, but on account of sickness or accident to one of his horses he may find it necessary to drive a single rig temporarily, and it might be a hardship to insist upon a special license for that purpose.

The course to pursue in matters of this kind, will, of course, have to be dictated by the good judgment of the police and your department.

A copy of the ordinance, with complete schedule of fees, is enclosed herewith.

Yours very truly,

EMIL C. WETTEN,
First Assistant Corporation Counsel.

JUNE 25, 1908.

THOMAS F. SCULLY, Esq., Alderman, Tenth Ward.

Dear Sir:

You have requested this department to prepare an ordinance having for its object the licensing and regulation of factories in which ice cream is made, and have requested an opinion as to the legality of such ordinance in view of the fact that the Legislature at its last session enacted a comprehensive statute covering this subject.

Upon investigation of the question based upon the hypothesis that the desired regulation would be proper and legal under the general police power delegated by the Legislature to the cities, and having for its object the preservation of public health, I find that the only serious proposition involved is whether or not the city would have the authority to pass an ordinance which would in its terms either restrict or enlarge upon the provision of the statute.

It will be noted that the penalty provided in the statute for a failure to comply with the regulations required to be observed in ice-cream factories is a fine of not less than fifty dollars nor more than two hundred dollars, nor more than five hundred dollars for the second offense or imprisonment not more than thirty days and for the third offense by a fine of not less than five hundred dollars nor more than sixty days'

imprisonment, or both. This fact is important, as you may recall that the authority of the city is limited to the imposition of a fine not exceeding two hundred dollars for the violation of any ordinance.

It is true that there are some foreign decisions, notably Texas decisions, which hold that an ordinance imposing a maximum or minimum penalty for the commission of a misdemeanor which is either greater or less than the penalty of a statute covering the same offense is absolutely void. However, I find that this doctrine has not been adopted in our State, where the courts have announced the proposition that although the city ordinance and statute differ in the maximum and minimum penalties imposed, that fact does not necessarily create such a conflict between the two that they can not stand together.

City of Amboy v. Sleeper, 31 Ill., 499.

City of Springfield v. Springfield Coal Co., 71 Ill. App., 432, 441.

City of Quincy v. O'Brien, 24 Ill. App., 491.

Baldwin v. Murphy, 82 Ill., 485.

Cooley on Const. Lim., 279.

Dillon on Municipal Corporations, 406.

The case of *Hankins v. People of the State of Illinois*, 106 Ill., 628, lays down the principle, which has been uniformly followed, that the Legislature may rightfully declare the same act to be two offenses and to be punished as such and that an offender may be prosecuted both under a city ordinance passed pursuant to authority granted to the city, as well as under the general law of the State.

I am of the opinion that the Legislature did not intend to withdraw from the city its power to pass police regulations with respect to sanitary conditions of ice-cream factories within the municipality, and that the city, notwithstanding the enactment of a statute, may further regulate the subject by ordinance consistent with the statute.

Dillon on Municipal Corporations, 406.

State v. Welch, 36 Conn., 215.

Huddleson v. Ruffin, 6 Ohio State, 104.

Enclosed herewith you will please find an ordinance which I have prepared without the assistance of the Sanitary Department, for introduction in the Council next Monday night.

There are, perhaps, many changes which should be made, but this is a matter which can be disposed of while the ordinance is being considered by the proper committee.

Yours very truly,

HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

JUNE 29, 1908.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

Answering your request to be advised whether or not there is any legal objection to the issuance of a permit to the Calumet & South Chicago Railway Company to install a direct current feeder from its power house on Ewing avenue south on said avenue to Ninety-fifth street, thence on Ninety-fifth street to South Chicago avenue, thence on Chicago avenue to Ninety-third street, thence on Ninety-third street to the Burnside Power House on Drexel boulevard, I would say:

The extent to which the applicant herein is granted certain rights in the streets, avenues, etc., named in its application is fully set out in the ordinance of March 30, 1908, beginning at page 4771, Council Proceedings of that date, under the caption "Exhibit A."

The question of the legality of a permit is to be determined by the terms of this ordinance. Upon investigation, I find that the ordinance grants the company the right to operate, maintain, etc., a street railway on Ewing avenue from Ninety-second street to One Hundred and Sixth street. Ewing avenue begins at Ninety-second street, hence, that part of it between Ninety-second street and Ninety-fifth street, inclusive, is within the limits named in the ordinance. Likewise the

applicant is given similar rights on Ninety-fifth street to South Chicago avenue.

Its rights under the ordinance on South Chicago avenue extend from South Park avenue to Ninety-fifth street, but in that part from Vincennes avenue to Cottage Grove avenue, the applicant's rights under the ordinance are subject to the existing rights of the Chicago Electric Traction Company. That part of the ordinance dealing with Ninety-third street is as follows:

"Ninety-third street, from Cottage Grove avenue to the westerly line of the New York, Chicago & St. Louis Railroad shop grounds, thence southeasterly and easterly on private right of way to the alley in Block 11 of the Calumet, Chicago Canal & Dock Company's subdivision of that part of the southeast quarter of Section 2, Township 37 North, Range 14, East, lying east of the New York, Chicago & St. Louis Railway and north of the Chicago & Western Indiana Railway, thence easterly on said alley and private right of way to Stony Island avenue;"

"Ninety-third street from Stony Island avenue to Exchange avenue."

"Ninety-third street from South Chicago avenue to Erie avenue."

I find that the ordinance as to Ninety-third street includes the distance asked in said application to be covered.

I am of the opinion that there is no legal objection to the issuance of such a permit, providing that from Vincennes avenue to Cottage Grove avenue on South Chicago avenue, it does not interfere with the existing rights of the Chicago Electric Traction Company.

Yours very truly,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

JULY 3, 1908.

WILLIAM J. PRINGLE, ESQ., Alderman, Third Ward.

Dear Sir :

In response to your verbal request for information concerning the liability of the Illinois Telephone and Telegraph Company to forfeit certain of its rights, I beg leave to call your attention to Section 5 of an ordinance passed February 20, 1899, granting certain rights in certain streets to said company, which said section is as follows:

“Said Illinois Telephone and Telegraph Company shall, within five years from the date hereof, construct and have in operation a telephone exchange serving 2,000 telephones of bona fide subscribers under this ordinance, and in case of a failure so to do, shall forfeit and pay to the City of Chicago fifty thousand dollars (\$50,000.00), to be paid within sixty (60) days after the expiration of said five years, and in case of failure to pay said fifty thousand dollars (\$50,000.00) within the time hereby designated shall forfeit all rights acquired under this ordinance, together with its plant, wires, poles and conduits then in the streets belonging to said company, and said company shall, within six (6) months after it shall have a plant in operation in said city, connect its wires with the Mayor’s office, the Department of Public Works, the Fire Department, the Police Department, the Building Department, the City Collector’s Office, the City Clerk’s Office, the Civil Service Department, the Health Department, the Law Department and the Council Chamber, and place and keep one telephone in each of said places, free of charge to the City of Chicago, and shall connect the same with said company’s exchange in said city, so that the same may be used in connection with the lines of said company, and said company shall, if required, rent to the City of Chicago telephones for the sole use of the police and fire alarm system of said city at any annual rental of not to exceed five (5) dollars per annum for each telephone; provided, that any time during which said company shall be restrained or enjoined from proceeding with the construction of said work, or the use of any part thereof, by proceedings in any court, shall not be computed as a part of the time hereinbefore limited for the construction

of an exchange. However, such exclusion shall date only from the time when the said company shall have given notice to the Corporation Counsel of the City of Chicago of the institution of such legal proceedings. The City of Chicago shall have the right to intervene in any suit or proceedings brought by any one seeking to enjoin, restrain or in any manner interfere with the construction or operation of such telephone system and move for a dissolution of any injunction or restraining order, and for any other proper order in such suit, in case it shall deem such suit collusive or instituted for the purpose of delay."

On the 15th day of July, A. D. 1903, another ordinance relative to said Illinois Telephone and Telegraph Company was passed, Section 1 of which was, in part, as follows:

"That permission and authority are hereby granted to the Illinois Telephone and Telegraph Company, its successors and assigns, to construct, maintain, repair and operate in and through tunnels which have been constructed under the terms of an ordinance of February 20, 1899, or which may hereafter be constructed under this ordinance or under the ordinance of February 20, 1899, for and during the term of said ordinance of February 20, 1899, not only wires and electrical conductors as provided in said last mentioned ordinance, but also any appliance or apparatus for the transmission and transportation of newspapers, mail matter, packages, parcels or merchandise."

Section 11 of said ordinance of July 15, 1903, is as follows:

"The said company shall, within two years after the date when this ordinance shall be in force, install and operate in the tunnels herein authorized, so far as the same shall be completed, a system, by car or other proper and appropriate appliance, by which said company shall convey and transport such packages, mail matter, newspapers or merchandise, as may from time to time be offered to it for such conveyance and transportation by any person or persons desiring the same; and said conveyance and transportation of such mail matter, packages, newspapers and merchandise shall be maintained and continued through said tunnels by said company,

its successors and assigns, during the life of this ordinance, unless the property shall be acquired by the city under the terms of Section 6 hereof. *And if the said company shall fail to construct the tunnels herein authorized in the district bounded on the south by Twenty-second street, on the west by Halsted street, and on the north by Chicago avenue, and to operate in and through said tunnels a system for the transportation and delivery of packages, mail matter, newspapers and merchandise, within five (5) years from the date when this ordinance goes into effect, then said company shall forfeit and pay to the City of Chicago two hundred thousand dollars (\$200,000), to be paid within sixty (60) days after the expiration of said five years, and in case of failure to so pay said sum of \$200,000, within the time herein designated, said company shall forfeit all rights acquired under this ordinance, together with its plant and equipment for transportation purposes then installed.*

“If said company, its successors and assigns, shall fail to construct or shall cease to operate fifty (50) miles of such tunnels within ten years from the time this ordinance goes into effect, then and in that case said company, its successors and assigns, shall also forfeit to the city all rights acquired under this ordinance, together with its plant and equipment for transportation purposes then installed, and if said company, its successors and assigns, shall fail to construct, equip and install a telephone system under the terms of said ordinance of February 20, 1899, adequate for the service of 20,000 subscribers within five years from the date of the going into effect of this ordinance, or if at any time after said five years said company, its successors and assigns, shall not have in operation or shall cease to operate a telephone system serving 20,000 bona fide subscribers, then and in each such case said company, its successors and assigns, shall also forfeit to the city all rights acquired under said ordinance of February 20, 1899, together with its plant and equipment for telephone purposes and shall be under obligation to furnish the city without charge all space in any or all of its tunnels and conduits necessary for the carrying on of said telephone business. This ordinance, and every section thereof, so far as it conflicts

with or varies from the provisions of the said ordinance of February 20, 1899, shall be taken and construed as, and is hereby declared to be, amendatory of said ordinance of February 20, 1899."

Section 14 of said ordinance provides:

"This ordinance shall take effect and be in force from and after its passage and the filing of the acceptance, bond and certificate as required in Section 12 hereof."

To summarize briefly, the ordinance of February 20, 1899, does not contain any forfeiture features that are now the subject matter of your inquiry; but the ordinance of July 15, 1903, does contain two of such forfeiture features which, briefly stated, are, first, that if the company fails to construct tunnels, as authorized, in the district bounded on the south by Twenty-second street, on the west by Halsted street and on the north by Chicago avenue, and to operate through said tunnels a system for the transportation and delivery of packages, mail matter, newspapers and merchandise within five years from the date when said ordinance goes into effect, the company shall forfeit and pay to the city \$200,000.00, to be paid within sixty days after the expiration of said five years, and in case said company fails to pay said \$200,000.00 within said sixty days after the expiration of said five years, said company shall forfeit all rights acquired under said ordinance of July 15, 1903, together with its plant and equipment for transportation purposes then installed. Second, if said company fails to construct and install a telephone system under the terms of the ordinance of February 20, 1899, adequate for the service of 20,000 subscribers within five years from the date of the going into effect of the ordinance of July 15, 1903, or if at any time after said five years said company shall not have in operation, or shall cease to operate a telephone system serving 20,000 bona fide subscribers, said company shall forfeit to the city all rights acquired under the ordinance of February 20, 1899, together with its plant and equipment for telephone purposes, and shall be under obligation to furnish to the city, without charge, all space in any or all of its tunnels or conduits necessary for the carrying on of said telephone business.

This ordinance of July 15, 1903, was accepted by said company and its bond filed on the first day of October, A. D. 1903, so that said ordinance became in force and effect on the first day of October, 1903.

Said ordinance of July 15, 1903, was on the 20th day of July, 1903, amended in certain particulars that are immaterial in so far as the matter now under consideration is concerned.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

JULY 8, 1908.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

We are in receipt of your letter of recent date, with plats, correspondence and memoranda attached, asking for an opinion as to the legality of the opening of Mike Walsh street, now Surf street, from the old Lake Shore plank road, now Evanston avenue, to the present Sheridan road, which opening was accomplished by the Commissioners of Highways of the Town of Lake View in March, 1858.

Book 2 of the Records of the former Town of Lake View, now in possession of the City Clerk, contains, at page 28, a record of the proceedings of the Commissioners of Highways of the town taken in February and March, 1858, for the purpose of laying out the road in question. These proceedings conform in all respects to the then existing statute, providing for the laying out of new roads by Commissioners of Highways (see Scates, Treat & Blackwell's Illinois Statutes of 1858, page 353), nor does there appear to have been any appeal from the order of the Commissioners. The surveyor's description and plat, attached to and accompanying said order, show this road to be of the width of 66 feet with its south line 7.42 chains or 489.72 feet north of and parallel to the south line of the section (24-40-14), which section line is also the center line of Diversey boulevard.

Subsequently, in 1869, a plat was duly certified, acknowledged and recorded, entitled LeMoyne's subdivision of the

south 16 acres of the east half of the northwest quarter of Section 28-40-14, and covering substantially the territory between Evanston avenue and the Sheridan road, and Surf street and Diversey boulevard. An inspection of this plat shows that the distance indicated between the center line of Diversey boulevard and the south line of Surf street is 495 feet, or 5.28 feet more than the actual distance according to the survey made for the Commissioners of Highways in 1858. The report of your Engineer of Streets, dated April 6, 1908, shows that owners of the northerly lots in LeMoyne's subdivision have appropriated five feet of this 5.28 feet excess from the south side of Surf street, leaving the city with a sixty-one-foot street, instead of the sixty-six-foot street, originally laid out. The report of the engineer also shows that while the adjoining owners have taken possession of the south five feet of Surf street, no buildings have been erected on this strip.

If the city authorities had stood by for a period of years and permitted the occupation of a part of Surf street under circumstances which would make it unjust or inequitable to claim it again as a public street, the city might now be estopped or precluded from interfering with such occupation. The erection of permanent improvements on the five-foot strip would probably be held to constitute such circumstances. Under the existing facts, however, we see no reason why the adjoining owners should not be required to vacate so much of the original sixty-six foot street as they now occupy, since mere adverse possession of part of a public street by an adjoining owner, however long continued, does not bar the public right. In the case of *Sullivan v. Tichenor*, 179 Ill., 97, the fencing in and possession for over twenty years of six feet of the street was relied upon by an adjoining owner as ground for claiming title to the six-foot strip. The court, however, held otherwise, saying in part (pages 101-2) :

“In all the cases to which we have been referred as sustaining the right of one who has trespassed upon a public street to retain the premises so taken, there has been some other element than the mere fact of possession, and the conditions have been such that it was necessary to estop the

municipality to prevent injustice and wrong. . . . In this case there is nothing but the naked fact of possession by the complainant and non-user for a long time by the public authorities."

To the same effect, see *DeKalb v. Luney*, 193 Ill., 185.

We would recommend that you take steps to establish as the building line on the south side of Surf street, the south line of the old road as laid out in 1858. We would also advise you to serve the owners of property adjoining the south side of Surf street with written notice of the city's rights, requiring them at the same time to remove all fences, door steps, or other obstructions from the street. We would also recommend that you notify the Building Department of the situation, in order that no plans for buildings may be approved which extend over the true building line, and that the Map Department also be notified in order that the city's atlas may indicate the actual status of the north five feet of LeMoyne's subdivision.

Yours very truly,

WILLIAM K. OTIS,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

JULY 8, 1908.

M. L. BELL, Esq., Chicago, Rock Island & Pacific Railway Co.

Dear Sir:

There has been referred to me by the Corporation Counsel your communication of the 1st inst. regarding an auction sale of unclaimed property which was attempted to be held at the local freight-house of the Chicago, Rock Island & Pacific Railway Company, but which was stopped by the police because the person in charge of the sale was not a regularly licensed auctioneer.

It is contended on behalf of the company that such sale is authorized without the intervention of a licensed auctioneer by virtue of an act of the Legislature providing for the sale of unclaimed property. It is further contended that, inas-

much as a single transaction is not sufficient to constitute one a broker, therefore a single auction sale would not require the services of a licensed auctioneer.

Under Subdivision Ninety-first, Section 1, Article V, of the Cities and Villages Act, the City Council is empowered "to tax, license and regulate auctioneers," etc. By virtue of said grant of power the City Council passed an ordinance contained in Chapter VIII of the Revised Municipal Code of Chicago of 1905, which relates to auctions and auctioneers. Section 127 of said chapter provides as follows:

"127. PENALTY.—Any person who shall sell or attempt to sell at public auction in this city any real or personal property of any kind whatsoever (except under and by virtue of legal process or under and by virtue of a mortgage), without first having obtained a license therefor, as herein required, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

Section 1 of "An Act to provide for the sale of personal property by common carriers, warehousemen and inn-keepers, and by others having liens thereon," in force July 1, 1879, Chapter 141, Hurd's Revised Statutes of Illinois, 1906, page 2025, provides as follows:

"That whenever any trunk, carpet-bag, valise, bundle, package or other article of property, . . . shall remain unclaimed, and the legal charges thereon unpaid . . . it shall be lawful for such common carrier, . . . to sell such article at public auction, after giving the owner or consignee fifteen days' notice . . . and out of the proceeds of such sale to pay all legal charges on such articles, and the overplus, if any, shall be paid to the owner or the consignee, upon demand."

The purpose of this legislative enactment is to enable the carrier to enforce its lien by a sale of the property. Without this enactment it would only have the right to retain possession of the property until all legal charges thereon are paid, and it would have no right to dispose of the property by sale or otherwise. The statute does not expressly provide that a sale may be made without the services of a licensed auctioneer. There is no conflict between the statute and the code, and the

provisions of both may, and should, be construed together. Since the code expressly provides that no person shall sell or attempt to sell at public auction any property whatsoever (except under and by virtue of legal process or a mortgage) without a license, and as the sale contemplated does not come within the above exceptions, I am of the opinion that such sale should be conducted by a regularly licensed auctioneer.

It is true that in the case of *O'Neill v. Sinclair*, 153 Ill., 525, our Supreme Court held that a single transaction does not constitute one a broker, but that was under an ordinance which made it unlawful for any person to exercise within the city the business of a broker without a license. The court laid particular stress on the fact that only a person exercising the business of a broker was required to take out a license, and therefore a person making but one sale could not be considered as exercising the business of a broker. The ordinance which we have under consideration differs from that ordinance in that it provides that *no person* shall sell at public auction, with certain exceptions, without a license. This case, therefore, is not applicable in the present situation.

I am of the opinion, therefore, that the Police Department had a right to stop the contemplated sale.

Yours very truly,

GEORGE E. DIERSSEN,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

JULY 17, 1908.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

In accordance with a resolution passed by your honorable body at its last meeting requesting an opinion from the Corporation Counsel as to the right of the Illinois Telephone and Telegraph Company, its successors or assigns, to legally operate cars on its tracks laid in the tunnels under the various streets in the City of Chicago, because said Tunnel Company

had failed to first obtain the written consent of a majority of the property owners fronting upon said streets, I beg to advise you that I have learned upon investigation that the original articles of incorporation of the Illinois Telephone and Telegraph Company state the objects for which that corporation was formed to be:

“To manufacture, buy, sell and deal in telephone instruments, telegraph instruments and all kinds of electrical appliances and apparatus; to buy, sell, lease and deal in electrical patents and patent rights; also to acquire, construct, build, buy, sell, lease and operate telephone plants, telegraph plants and plants for the conveyance and transmission of sounds and signals by electricity.”

I further find that the first ordinance granted to the Illinois Telephone and Telegraph Company was passed on February 20, 1899, and the grant of power which is found in Section 1 of that ordinance is as follows:

“That permission and authority be and they are hereby granted to the Illinois Telephone and Telegraph Company, its assigns and lessees, to construct, maintain, repair and operate, in the streets, avenues, alleys and tunnels, and other public places in the City of Chicago, and under the Chicago river and its several branches, for and during the term of thirty (30) years from the passage of this ordinance, a line or lines of conduits and wires, or other electrical conductors, together with all necessary feeders and service wires, or other electrical conductors, to be used for the transmission of sound, signals and intelligence, by means of electricity or otherwise.”

I further find that a supplemental ordinance was passed on the 15th of July, 1903, and that the grant of power in that ordinance is as follows:

“That permission and authority are hereby granted to the Illinois Telephone and Telegraph Company, its successors and assigns, to construct, maintain, repair and operate in and through tunnels which have been constructed under the terms of an ordinance of February 20, 1899, or which may hereafter be constructed under this ordinance or under the ordinance of February 20, 1899, for and during the term of said ordinance of February 20, 1899, not only wires and

electrical conductors, as provided in said last mentioned ordinance, but also any appliance or apparatus for the transmission and transportation of newspapers, mail matter, packages, parcels or merchandise.

“At the expiration of the said grant of February 20, 1899, and at the expiration of the present grant, namely, February 19, 1929, all tunnels and conduits heretofore constructed and all tunnels hereafter constructed under said ordinances, shall, without the payment of any consideration, become and be the absolute property of the City of Chicago, free from liens and incumbrances.

“And the said Illinois Telephone and Telegraph Company hereby agrees to promptly vacate said conduits and subways, unless specific authority to continue in possession is given by the City Council of the City of Chicago.”

I have not been able, in the limited time given me to prepare this opinion, to ascertain whether the objects stated in the charter of this corporation have been enlarged, changed or modified since the company was first organized, but it will be noted that under the original charter no power was granted to operate a railway of any kind or description. It will also be noted that in the first ordinance of February 20, 1899, there was no mention whatever made as to the construction or operation of a railroad. Neither was any mention made of the construction or operation of a railroad in the supplemental ordinance of July 15, 1903.

The company, not being authorized by its charter from the State, and no grant having been given by the Council, either in the first or the supplemental ordinance, to operate a railroad, frontage consents were not necessary, and the failure to procure such consents prior to the passage of the ordinances could not in any way affect the validity of the same, inasmuch as the Council in neither of the ordinances attempts to confer upon the company the right to operate a railroad.

The statute provides that:

“The city council or board of trustees shall have *no power* to grant the use of or the right to lay down any railroad

tracks in any street of the city to any steam, dummy, electric, cable, horse *or other railroad company*, whether the same shall be incorporated under any general or special law of the State, now or hereafter in force, *except* upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile if any in excess of the whole miles, measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes."

If it is a fact that since the passage and acceptance of the ordinances in question the company is operating a railroad in the streets of the city, such as is contemplated by the statute should not be so operated unless the company had first obtained frontage consents, and the company had not secured such consents, then clearly, the Illinois Telephone and Telegraph Company did not have the right to lay its tracks in the streets, and, therefore, has no right to operate cars upon these tracks at the present time.

The legal determination of the question submitted must necessarily be dependent upon the facts actually existing with reference to what the company is doing in the premises, and inasmuch as no such definite information has been furnished to me, and lack of time in the preparation of this opinion has prevented the securing of same, I can only submit the two general propositions, namely: First, that a corporation organized under the general laws of this State can not construct and operate a railroad upon the public streets except under certain special conditions, which conditions I do not understand exist in this specific case. Second, no railroad company has the right to lay railroad tracks in any of the streets of this city without an ordinance from the City Council, and the City Council has no right to pass such an

ordinance except upon the petition of property owners as provided in the frontage consents statute.

Yours very truly,

EMIL C. WETTEN,
First Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JULY 8, 1908.

WALTER H. WILSON, Esq., Comptroller.

Dear Sir:

In reply to your verbal inquiry whether the proceeds of the general corporate bonds of the city to be issued under the authority of an ordinance passed June 22, 1908 (C. P., 629), can be used to reimburse the corporate fund for expenditures heretofore made therefrom for permanent improvements, I beg to say:

The rule applicable to such cases has been laid down in the recent decision of *The People ex rel. City of Chicago v. Hummel*, 215 Ill., 43, in which the Supreme Court held that an ordinance authorizing the issue and sale of bonds for the purpose of making permanent municipal improvements did not authorize the use of the proceeds to take up *previously issued* tax warrants, even though the tax warrants had been sold to pay for permanent improvements.

The decision was based on the ground that the ordinance authorizing the bonds showed an intention on the part of the Council that the proceeds from their sale should be used only to pay for permanent improvements constructed *thereafter*.

The court said:

"To hold that the city has the right to use the fund derived from the sale of said permanent improvement bonds to pay for improvements made prior to the passage of said ordinance would be to give said ordinance a retroactive effect, . . . and it has been repeatedly held in this State that a statute will be presumed to operate prospectively only, and will not be construed to have a retroactive operation unless the

language employed is so clear that it will admit of no other construction."

The purpose for which the present bond issue is authorized is stated in Section 1 of the ordinance as follows:

"To complete public improvements now constructing, to make further improvements and for the general corporate purposes of the city."

It can hardly be said that there is a clear intention manifested in this language to give the ordinance a "retroactive effect" to the extent of reimbursing a particular fund out of which permanent improvements already made have been already paid for.

"The completion of public improvements now constructing" authorizes payment for improvements made prior to the passage of the ordinance only where the expense of making such improvements has not in some way been already liquidated.

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

JULY 22, 1908.

MURDOCK CAMPBELL, Esq., Commissioner of Buildings.

Dear Sir:

Answering your verbal request for an opinion as to your right to issue a permit and approve the construction of fire escapes on the U. S. Marine Hospital, located on Bittersweet street and Clarendon avenue, the same being on property owned by the United States and being under the supervision and control of the United States and within the city limits of the City of Chicago, will state, that by an act of our State Legislature, enacted and in force April 11, 1899, the consent of the State of Illinois was given to the United States "to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this State required for custom houses, courthouses, postoffices, arsenals, or other public

buildings whatever, or for any other purposes of the county.” By Section 25, Chapter 143 of the same act, “exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States, for all purposes except the administration of the criminal laws and the service of all civil processes of this State; but the jurisdiction so ceded shall continue no longer than said United States shall own such lands.”

By Section 26 of said act this jurisdiction “shall be and continue exempt and exonerated from all State, county and municipal taxation, assessment or other charges which may be levied or imposed under the authority of this State,” and by these sections of our State law above quoted it clearly appears that exclusive jurisdiction has been granted to the United States for the erection of public institutions, such as this hospital. The only exemption being the enforcement of criminal laws and the service of civil process of this State, but included in this grant is an exemption from State, county and municipal taxation, assessment or other charges which may be levied or imposed under the authority of this State.

In granting a permit for the construction of the fire escapes in question, if such permit was issued, you would, under our city ordinances, be compelled to charge the fees for said permit provided therein, and this would be contrary to the spirit and intention of the State law ceding jurisdiction to the United States. Wherever there is a conflict between our State laws and the city ordinances of the City of Chicago, the State law controls, and there being a conflict in this case, the State laws ceding exclusive jurisdiction to the United States, with the exception above mentioned, would, in my opinion, control, and you should not issue a permit nor supervise the construction of these fire escapes on said hospital, but on the contrary you should not interfere with the construction of these fire escapes.

From the report made to me by Inspector Thomas of your department and the requirements of the State law and city ordinances relative to fire escapes on hospitals, I am clearly of the opinion that as a matter of public safety these fire escapes should be constructed, but your department, not

having jurisdiction over the same, can not specify the kind of fire escapes that shall be constructed.

Yours very truly,

WM. S. STAHL,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

JULY 22, 1908.

HON. FRED A. BUSSE, Mayor.

Dear Sir:

Replying to your oral request for an opinion relative to the above matter, will say, that in 1874 the Legislature of this State passed an act regulating the inspection of oil. Section 1 of the act (Chapter 104, R. S. 1905), provides as follows:

“The judge of the county court of any county for townships outside of incorporated cities, towns and villages, the mayor of any city, with the approval of the city council and the board of trustees of any village or town, may, and on the petition of any five inhabitants thereof shall, appoint one or more inspectors for the inspection of coal oil, naphtha, gasoline, benzine, and other mineral oils or fluids, the product of petroleum, and fix their compensation, to be paid by the party requiring their services. Every such inspector shall hold his office for one year, and until his successor is appointed and qualified, unless sooner removed from office. He may appoint deputies, for whom he shall be responsible, and who shall take the same oath and be liable to the same penalties as the inspector.”

Sections 2, 3, 4, 5 and 6 provide the form of oath to be taken and subscribed by the oil inspector, the giving and the approval of the bond of such inspector, the manner of making the test, branding or marking the package tested, keeping of a public record and penalty for misconduct in office. Section 7 provides as follows:

“Any manufacturer, refiner or producer of, or any dealer in coal oil, naphtha, gasoline, benzine, or other mineral oil or

fluid, the product of petroleum, in any city, village or town in which such inspector is appointed, who shall neglect to give notice to such inspector, of any such oil or fluid in his possession not already inspected by some authorized inspector of this State, within two days after the same is made or refined by him or received into his possession, or shall offer any such oil or fluid for sale before the same has been so inspected, or shall sell or attempt to sell to any person, for illuminating purposes, any such oil which is below the approved standard — that is, having igniting point less than one hundred and fifty degrees Fahrenheit, as indicated and determined in the manner herein provided, or shall use any package, cask, barrel or other thing having the inspection brand thereon, the oil or fluid therein not having been inspected, or shall counterfeit any brand, shall be fined not exceeding \$200 and be liable to the party injured for all damages occasioned thereby, and all the casks, barrels or packages so falsely used, and their contents, shall be forfeited, and may be seized and sold.”

Section 8, the manner of recovering fines, etc.

Pursuant to Section 1 of this act, Charles W. Andrews was appointed Oil Inspector of the City of Chicago and such appointment was duly approved by the City Council and he duly qualified as such inspector by complying with the provisions of Section 2 of the act.

The Legislature clearly intended to provide for several different misdemeanors in Section 7 of the act. This appears from the use of the disjunctive construction of Section 7. Such a construction is frequent where it is the intention of the Legislature to provide that an offense may be committed in any one of several distinct manners. Thus, in forgery the one who makes the forgery and the one who utters the forged paper are each guilty of the offense. A similar construction appears in the statute on conspiracy, embezzlement, burglary and many other sections of the Criminal Code.

Under Section 7 of the Oil Statute it is distinctly provided:

(a) That “any manufacturer, refiner or producer of, or any dealer in . . . gasoline . . . in any city . . . in which such inspector is appointed, who shall neglect to give

notice to such inspector of any such oil . . . in his possession not already inspected by some authorized inspector of this State, within two days after the same is made or refined by him or received into his possession . . . shall be fined not exceeding two hundred dollars”

(b) That “any manufacturer, refiner or producer of, or in which such inspector is appointed, who . . . shall offer any such oil . . . for sale before the same has been so inspected . . . shall be fined not exceeding two hundred dollars”

(c) That “any manufacturer, refiner or producer of, or any dealer in . . . gasoline . . . in any city . . . in which such inspector is appointed, who . . . shall sell or attempt to sell to any person for illuminating purposes any such oil which is below the approved standard — that is, having igniting point less than one hundred and fifty degrees Fahrenheit, as indicated and determined in the manner herein provided . . . shall be fined not exceeding two hundred dollars”

(d) Also that “any manufacturer, refiner or producer of, or any dealer in . . . gasoline . . . in any city . . . in which such inspector is appointed, who . . . shall use any package, cask, barrel or other thing having the inspection brand thereon, the oil . . . therein not having been inspected, . . . shall be fined not exceeding two hundred dollars”

(e) And, also, that “any manufacturer, refiner or producer of, or any dealer in . . . gasoline . . . in any city . . . in which such inspector is appointed, who . . . shall counterfeit any brand, shall be fined not exceeding two hundred dollars”

An examination of the statute clearly discloses each of the above several distinct offenses.

It is contended by some of the manufacturers and dealers that volatile oils or fluids, such as gasoline or naphtha, are not subject to the provisions of the statute because such fluids can not be tested by the fire test provided in Section 3 of the act, and that Section 7 refers only to oils sold for illuminating

purposes. The question as to whether such fluids can be tested by the fire test is purely a matter of chemistry. We are, however, informed by competent experts that such a test is practical.

The contention that Section 7 refers only to oils sold for illuminating purposes is clearly refuted by the analysis of Section 7 herein previously made. Illuminating oils are only referred to under the offense set forth in Paragraph (c), which reads as follows:

That "any manufacturer, refiner or producer of, or any dealer in . . . gasoline . . . in any city . . . in which such inspector is appointed, who . . . shall sell or attempt to sell to any person for illuminating purposes any such oil which is below the approved standard — that is, having igniting point less than one hundred and fifty degrees Fahrenheit, as indicated and determined in the manner herein provided . . . shall be fined not exceeding two hundred dollars"

While it is undoubtedly true that the oil is reduced to a vapor before it is illuminated, nevertheless we are clearly of the opinion that it is commercially known as an illuminating oil and is constantly dealt with in the market as such. Gasoline was decided to be an illuminating oil by the Supreme Court of Kentucky in *Burkhardt v. Striger*, 24 Ky. Law R., 69. In passing on a similar contention the court in that case used this language:

"We are unable to concur in the contention of counsel. In Section 2190 the words 'oil for illuminating purposes' seem to us evidently an abbreviation of the description given in Section 2202 of 'oils and fluids, the product of coal, petroleum or other bituminous substances, by whatever name called, which may or can be used for illuminating purposes.' The article upon the subject of illuminating oils does not seem to us designed merely to provide a safe illuminant for the ordinary useful purposes of life, but to be also a police measure, designed to protect the public against attempting to use oils or fluids of the description given in the act which are not

safe when used as illuminants in the ordinary mode by requiring an inspection of all oils so produced, and giving warning to the prospective consumer that the more inflammable oils are not safe when used in such manner. The use of gasoline and similar fluids as illuminants in gas machines, portable or stationary, and the portable machines are frequently seen in use on the streets, is distinctly recognized by Section 2207.

“Nor can we see much force in the contention that gasoline can not be used for illuminating purposes because when used for the production of light it does not burn until transformed into vapor. It might as well be said that electricity is not used for illuminating purposes in the incandescent light because the light is not given directly from the electricity, but from the heated carbon.

“It is quite true that in the case of a fluid as volatile as gasoline it is entirely unnecessary to heat the fluid in order to find out whether the temperature at which the oil ignites or permanently burns is above or below 130 Fahrenheit, for the reason that gasoline will ignite at practically any temperature reached in this climate. In fact, the test provided by Section 2205, Subsection 4, is not required to be applied in the case of gasoline, benzine and similar fluids, for, as will be seen by an examination of the subsection, it is only in case the oil does not ignite before being heated that the lamp is to be placed under the water cup. If the unwarmed fluid does ignite, the further test provided by Subsection 4 is useless.

“We think the intent of the statute clear to require an inspection of all the oils and fluids described in Section 2202, and that all such oils are included within the exception in Section 2190. It follows, therefore, that the inspector had the right to inspect the oils sold by appellant and was entitled to his legal fee for such inspection.”

We are, therefore, of the opinion that a person selling gasoline to be used for illumination would be guilty of the offense set forth in Paragraph (c), *supra*, and that a dealer in gasoline may be guilty of any one of the offenses set forth under Paragraphs (a), (b), (d) or (e), *supra*, regardless of

the question as to whether gasoline is or is not an illuminating oil.

Yours very truly,
JOHN J. BEILMAN,
Assistant Corporation Counsel.

Approved:
EDWARD J. BRUNDAGE,
Corporation Counsel.

JULY 27, 1908.

JOSEPH SCHLITZ BREWING Co.

Gentlemen:

Replying to your request for an opinion relative to your right to sell a beer which contains only one-half of one per cent alcohol and specially manufactured as a temperance drink, will say, a dramshop is defined by our statute as a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon and intoxicating liquors shall be deemed to include all such liquors within the meaning of the act. Chapter 43, Revised Statutes 1905.

Section 62 of Chapter 24 of the Statutes provides the City Council in cities . . . shall have the following powers:

Clause 46. To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor. . . . Provided further that in granting licenses such corporate authorities shall comply with whatever general law of the State may be in force relative to granting licenses.

Pursuant to the foregoing, the City Council of Chicago passed ordinances regulating the manufacture and sale of such liquors and divided the ordinances by providing for licensing and regulating the same in five distinct classes. Article 1 relates to saloons and dramshops. Section 1338, as amended January 8, 1906, page 2087, Council Proceedings, provides:

“Every Place Where Liquor is Retailed a Dramshop.—Every place where spirituous, malt, vinous or intoxicating liquor of any kind whatsoever is sold, given away, or other-

wise disposed of, in quantities of less than one gallon, whether consumed or to be consumed, upon the premises or not, and whether sold, given away, or disposed of in any grocery store, department store, liquor store, or other place whatever, shall be deemed and is hereby defined to be a dramshop, and is hereby required to be licensed in accordance with the provisions of this article; and no person shall keep, conduct, or maintain any such place unless he be licensed so to do in accordance with and pursuant to the provisions of this article.

“Provided, That no license shall be issued to any person for the keeping of a saloon or dramshop in connection with, or as a part of, any candy store, ice-cream parlor, fruit store or bakery; nor shall any intoxicating liquors be sold or offered for sale in any place used wholly or in part as a candy store, ice-cream parlor, fruit store or bakery.”

Article II relates to brewers and distillers. Article III to wholesale malt liquor dealers. Article IV to wholesale spirituous liquor dealers and Article V to wholesale vinous liquor dealers.

Malt liquors — spirituous liquor — and vinous liquor are generic terms and under this statute such liquors have been branded as intoxicating without proof of their intoxicating character.

The right to sell the beer in question at retail is dependent upon the language of the statute and Section 1338 of the city ordinances.

If the beer is a malt or spirituous or vinous liquor, whether intoxicating or not, the sale thereof is prohibited within the city except by persons having a license to keep a dramshop, nor can it be manufactured or sold at wholesale without compliance with such other of the provisions of the ordinances relating to the particular product.

Yours very truly,

JOHN J. BEILMAN,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

JULY 29, 1908.

JAMES HORAN, ESQ., Fire Marshal.

Dear Sir:

Answering your request for an opinion in regard to the legality of an ordinance covering the equipment of buildings with sprinkler systems in the basements and subbasements within the loop district, will state, that the City Council has assumed and exercised the authority to require an automatic sprinkler system in buildings of slow burning construction where the stairs are enclosed in fireproof walls. (Section 558, Revised Municipal Code of Chicago, as amended November 25, 1907.)

By the Cities and Villages Act, Chapter 24, Article V, Clause 66, power is given the City of Chicago "to regulate the police of the cities or villages and pass and enforce all necessary police ordinances."

Clause 75, Chapter 24 of said Cities and Villages Act is as follows:

"To declare what shall be a nuisance and to abate the same and to impose fines upon parties who may create, continue or suffer nuisances to exist."

Our Supreme Court, in the *City of Chicago v. Gunning System*, 214 Ill., on page 638, says:

"The basis of sustaining the ordinance in all the cases is, that it is an exercise of the police power for the safety and welfare of the public. An act calculated to promote the health, comfort, safety and welfare of society may be regarded as an exercise of the police power of the State," . . . "In the exercise of the police power the State may require that the individual so manage and control his own property that the public health, public peace and public welfare may be conserved." . . .

"We think it clear that either under Paragraph 66 or 75, Chapter 24, Cities, Villages and Towns, full power and authority are conferred upon Cities, Towns and Villages to regulate the construction and use of billboards within their corporate limits, provided the regulation is not unreasonable."

In *Commonwealth v. Alger*, 7 Cush. 84, the court said:

"It is a well settled principle, growing out of the nature

of well ordered civil society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it . . . shall not be injurious . . . to the rights of the community. All property in this commonwealth is held subject to the general regulations which are necessary to the common good and general welfare."

In determining whether a wet or dry sprinkler system could legally be required by the City Council to be placed in the basements and sub-basements of buildings, we have to consider the question of whether it is a proper exercise of the police power of the city.

The question of the validity of an ordinance requiring the installation of a sprinkler system in basements and sub-basements within the loop district depends upon the reasonableness or unreasonableness of the ordinance.

In *Wabash & Western Ry. Co. v. City of Jacksonville*, 67 Ill., 40, the court said:

"What are reasonable regulations and what are subjects of police power must necessarily be judicial questions. Such regulations must be what they purport to be, police regulations, and must be reasonable."

Building ordinances of the City of Chicago have been upheld which established fire limits within the City of Chicago and which prohibit the erection of wooden buildings within certain limits and under certain restrictions. Ordinances requiring the erection of fire escapes and other means of public safety have also been upheld by our Supreme Court. *King v. Davenport*, 98 Ill., p. 305; *Patterson v. Johnson*, 214 Ill., 481-488; *Arms v. Ayer*, 192 Ill., 606, 613.

I find no reported case in our State where our Appellate or Supreme Courts have rendered a judicial decision upon the validity of ordinances requiring a sprinkler system, but if it clearly appears that the safety of the occupants of these basements and sub-basements require some additional safeguard in case of fire and the proper ordinance was drawn regulating the construction and maintenance of sprinkler systems in such a manner that would tend to lessen the danger and provide for the general safety of the public to occupy these basements,

then reasoning by analogy and having in view the decisions of our Appellate and Supreme Courts in other cases, I am of the opinion that the City Council could lawfully pass an ordinance requiring the installation of a sprinkler system in basements and sub-basements, but there is some question about limiting this law to the loop district, since all laws must be general in their application, but I think an ordinance can be so drawn as to obviate this legal objection.

Yours very truly,

WM. S. STAHL,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JULY 29, 1908.

A. W. FULTON, Esq., Alderman, Thirteenth Ward.

Dear Sir:

Replying to your letter of July 24, in which you ask for an opinion as to the right of the Metropolitan West Side Elevated Railroad Company to maintain cigar, fruit and news stands in stations, permit me to say:

I have examined the ordinance of April 7, 1892, found on page 922 of the Special Ordinances of Chicago, Vol. 2, which is the original ordinance granting authority to the Metropolitan West Side Elevated Railroad Company to construct, maintain and operate an elevated railroad. I have also examined the ordinances of June 29, 1900, February 11, 1901, June 23, 1902, July 7, 1902, February 23, 1905, March 26, 1906, and March 30, 1906, granting extensions and providing for various elevations, etc., in relation to said elevated road. The only reference to the question of stations which I find in any of these ordinances is found in Section 7 of the original ordinance on page 927 of Vol. 2, Special Ordinances. I do not find either any authority or any prohibition as to the operation of cigar, fruit and news stands, etc., in said section.

Where stations are constructed upon or over a public street or alley, I am of the opinion that the company has no authority to either operate in its own name, or lease to others

for operation, any space for cigar, fruit and news stands, for the reason that this business is wholly foreign to the business for which the corporation was formed and can not be an aid to any legitimate purpose of such company.

In relation to those stations which are built upon or over ground acquired either by purchase or condemnation, while the company may be exceeding its charter rights in operating or leasing space for the operation of cigar, fruit and news stands, it is a question that the ordinances of the City of Chicago do not deal with, and I doubt whether the city has authority to pass ordinances in relation thereto. If the company is exceeding the powers granted to it by its charter, this is a question for the State authorities to handle. A similar question to this has been quite thoroughly discussed in an opinion of this office on January 13, 1904, found on page 709 of Opinions of the Corporation Counsel and Assistants from April 5, 1897, to April 5, 1905, and also in an opinion of this office found on page 1136 of the Council Proceedings of 1902-3.

There is now no ordinance of the city controlling the matter on which you have requested an opinion, and as I view the matter, there is nothing that the city authorities can do until some action is taken by the council; all of which is respectfully submitted.

Yours very truly,

FRANK L. CHILDS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

JULY 29, 1908.

JOSEPH F. PEACOCK, Esq., City Real Estate Agent.

Dear Sir:

I acknowledge receipt of your letter of recent date, enclosing quit claim deed of George B. Harris, President of the C. B. & Q. R. R. Company and wife, dated July 2, 1908, conveying to the city certain land as described on condition that the same shall be used as a street only, and inquiring whether

such deed fulfills the obligations of this railway company under the ordinance passed April 27, 1908, Council Proceedings, page 100. The ordinance provides substantially for the vacation of certain property heretofore used as a public street and requires the railway company within a specified time "to procure and dedicate for the purpose of a public street" certain other property of which the premises described in the above deed are a part.

It may be said, in the first place, that the instrument does not and can not take effect as a deed or vest title in the city to the land in question because there are only two methods prescribed in the statutes by which a public street may be created, that is, by condemnation and by dedication, and it has been held that where the methods by which streets shall be acquired by a municipality have been prescribed by the Legislature, those methods are exclusive and prevent the creation of streets by private purchase. (*City of Chicago v. Hayward*, 176 Ill., 130; *Snydacker v. West Hammond*, 225 Ill., 154.)

While it is true that the deed is ineffective as such, or as a statutory dedication, it is, however, a general rule that when an intention to donate by the owner is plainly shown, either by acts from which such intent may fairly be presumed or such as should equitably estop him to deny such intent, this will amount to a good dedication at common law. (*City of Chicago v. C. R. I. & P. Ry. Co.*, 152 Ill., 561.) And the deed submitted, when placed on record, will undoubtedly be satisfactory evidence of an intention to dedicate.

Even as a common law dedication, however, the deed is not free from objections. The ordinance requires the company to dedicate this land for the purpose of a public street, absolutely, and without specifying any conditions. No reason exists, so far as I am aware, why the dedication should be upon the condition that whenever the premises described shall cease to be used for street purposes, the same shall revert to and revest in the grantors. Under no circumstances would we recommend that the city accept a dedication containing this restriction, since it was the undoubted intention of the ordinance to acquire a street which shall stand on the same footing with other streets in the city.

Your attention is also called to the fact that while a dedication can be made only by the owner of the property, in the present instance the city is without any assurance as to the title of George B. Harris to the property described in the deed.

For these reasons, and for the further reason that, as a matter of practical convenience, it is highly desirable that there should be on record in the Recorder's office a plat showing the new street, it is recommended that the company be requested to have a plat certified, acknowledged and recorded, showing the premises described in the deed as a street in accordance with the statute relating to plats. Inasmuch as the vacation provided for in the ordinance of April 27th was made at the request of and for the sole benefit of the railway company, it is believed that no objection to this course will be raised on their part.

In addition, I would remind you that to create a public street, it is necessary to follow up the dedication either statutory or at common law with an acceptance on the part of the city. Otherwise, the premises may still properly be assessed for taxation as private property. An acceptance may be accomplished by the formal action of the City Council or by some authorized assumption of control over the street, such as grading, paving, lighting or otherwise improving the same, or exercising control over it in any open and notorious manner.

The letter of E. A. Howard, of the railway company, and deed of Mr. Harris and wife are returned herewith.

Yours very truly,

WILLIAM K. OTIS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

AUGUST 1, 1908.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

Your communication of July 29, 1908, addressed to the Corporation Counsel, wherein you state that on July 4, the

Aeronautique Club of Chicago gave an ascension at Areo Park, Sixty-sixth street and South Park avenue, and that you are unable to determine the amusement classification of such exhibitions and requesting an opinion from this department, has been referred to me for attention.

In an interview, your license officer, William A. Haedtler, informs me that on the day in question the balloon ascension was the only amusement, entertainment or exhibition of any kind or character occurring on the grounds; also that an admission fee was charged. Class 9 of Section 99 of the Municipal Code of Chicago of 1905 provides that, "All poultry shows, horse shows, stock shows, flower shows, dog shows, cat shows, automobile shows, and any other show or exhibition of a like character intended to represent any sport, art, science, or the progress and development of same, shall belong to and be known as entertainments of the ninth class."

The recognized standard dictionaries uniformly refer to ballooning as an art or practice of ascending in and of managing balloons.

BALLOONING — the art or practice of managing balloons or voyaging in them. Webster's International Dictionary.

BALLOONRY — the art or practice of ascending in the balloon. Century Dictionary.

BALLOONRY — the *science* of ballooning. A Thesaurus Dictionary of the English Language.

Inasmuch as this balloon ascension under the definitions given to "ballooning" represents either an art or a science or the progress and development of the same, the exhibition, in my opinion, falls within the above quoted class, which requires the payment of a license fee of \$10.00 for each day or part thereof.

Yours very truly,

HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

AUGUST 5, 1908.

WILLIAM CARROLL, ESQ., City Electrician.

Dear Sir:

In your communication to the Corporation Counsel of August 3, 1908, you request an interpretation of the last two lines of Section 2182 of the Municipal Code with reference to the erection of illuminated signs proposed to be erected by the Olympic Music Hall and Chicago Opera House, in accordance with plans submitted with above letter.

The part of the ordinance relating to illuminated signs reads as follows: No illuminated signs shall be permitted to project beyond the curb line. No projecting illuminated sign exceeding six feet in length in its largest dimensions shall exceed half its length in width.

Two questions arise under this inquiry:

(1) Does the word "length" in the ordinance refer to the horizontal or vertical sides of the sign?

(2) Do the detached sections of the sign constitute separate signs within the meaning of the ordinance?

"Length" means the distance between any two given points.

People v. Chapin, 106 N. Y., 265.

In the construction of words of description in an ordinance the legislative intent should be followed. A construction should not be adopted which would lead to an absurdity.

Bird v. Board of Commissioners, 95 Ky., 195.

The ordinance, in placing a limit upon the size of illuminated signs, evidently intended to protect the view. If the word "length" in the ordinance referred to the vertical sides, it would allow the construction of a sign to an indefinite length in one direction and to the curb in the other.

I am of the opinion that the word "length" in the ordinance refers to the horizontal sides, and "width" to its vertical sides.

(2) I am of the opinion that the detached sections of the

sign constitute one sign. Any other construction would permit an evasion of the law.

In my opinion, the proposed signs do not comply with the ordinance.

Yours very truly,

ALBERT W. MAY,
Assistant Corporation Counsel,

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

AUGUST 5, 1908.

FRANK VOGLER, Esq., Chief Clerk, Board of Review.

Dear Sir:

Opinion on legal status of an alley south of and adjoining sub-lots 1 to 6, and east of and adjoining sub-lots 7 to 9 in Haines' re-subdivision of lots 1 to 5 in block 10, Fort Dearborn addition to Chicago.

From files submitted it appears on February 19, 1904, parties purporting to be owners in fee of all the lots abutting on the above-described alley, executed a petition addressed to Peter B. Olsen, as County Clerk of Cook County, asking that a tax sale of the alley made September 14, 1903, for general taxes assessed for the year 1902 be declared void and the certificates issued thereof, if any, cancelled, and the alley exempted from future assessments for general taxes. The petition alleges the recording of a plat, showing this alley, October 7, 1852, and fifty years' continuous use of the alley as a public thoroughfare without taxation. Subsequently the petitioners presented the plat contained in their petition to the Superintendent of Maps of the City of Chicago for approval by him. The Superintendent of Maps declined to approve it on the ground that his atlases showed a vacation of the alley, and October 26, 1905, the question was submitted, through the Commissioner of Public Works, to the Corporation Counsel for an opinion.

Further investigation reveals the following additional facts:

A. Chicago Title & Trust Co.'s Atlas A at page 127 contains the following entry:

"Subdivision of lots 1, 2, 3, 4 and 5 in Block 10 in Ft. Dearborn addition to Chicago, certified by City Surveyor September 16, 1852, described as '120 ft. on Lake st. by 169½ ft. on Wabash ave.,' acknowledged by Richard T. Haines, by William B. Ogden, his attorney in fact, September 30, 1852. No. 37006. Filed October 7, 1852. Recorded in Book 49, page 28."

The above is accompanied by a copy of the plat of the subdivision, which shows the alley in question. That part of the alley south of and adjoining sub-lots 1, 2, 3, 4, 5 and 6 is marked on the plat, "Alley"; that part of the alley east of and adjoining sub-lots 7, 8 and 9 is not marked.

Accompanying the foregoing notation and plat is the following additional notation:

"Vacation of an alley in block 10, Fort Dearborn addition. John V. Farwell, Isaac Anderson, Job D. Hols, and Peter Page and John P. Atwater acknowledge a *vacation* of alleys in rear of sub-lots 1, 2, 3, 4, 5, 6, 7, 8 and 9 of lots 1, 2, 3, 4 and 5, in block 10, etc., recorded in Book 49, page 28, September 12, 1856. (Said Atwater, September 8, 1856.) (Do not state to which lots the vacated alleys pertain). No. 75496. Filed September 12, 1856. Recorded in Book 125, page 24."

Letter-press copies of ante-fire abstracts now in the possession of the Chicago Title & Trust Company show that the parties executing the above vacation were the owners of all the lots in the plat recorded by Haines in 1852 and above referred to. These letter-press copies are declared to be good evidence in proceedings to establish title under the Burnt Record Act (see Hurd's Revised Statutes 1905, Chapter 116, Section 29).

Investigation of the records shows that subsequent conveyances of sub-lots 1 and 2 have expressly included the alley south adjoining and that conveyances of the other sub-lots have been made without any reference to the alley at all.

B. In that part of the alley east of and adjoining sub-lots 7, 8 and 9 the following notice is posted in two places:

“Notice — The land included between this wall and the wall opposite is private property. Public keep out. John M. Durand, owner. B. A. Thorpe, agent, 265 La Salle st.”

The same part of the alley is entirely covered by an extension of the building standing on sub-lots 7, 8 and 9, so that the alley adjoining those lots is in reality a mere passageway underneath the buildings, about fifteen feet in depth.

The whole alley, except the forty-eight feet adjacent to Wabash avenue, is undermined by a series of coal cellars, boiler rooms and storage rooms which have existed for many years, and the ceilings or roofs of which constitute the pavement of the alley.

The narrow width, location, and general physical aspect of this alley make it apparent that it is used only by teams desiring access to the rear of buildings standing on sub-lots 1 to 9, that it is of no use to the public as a thoroughfare, and that it was originally platted solely for the benefit of and as a convenience to the abutting property owners.

C. The records of the Bureau of Sewers, extending back to the Fire, fail to show that the City has at any time built a sewer in the alley. It does appear that there is a twelve-inch sewer in that part south of and adjoining sub-lots 1 to 6, inclusive, which is connected with the Wabash avenue sewer, and a notation is found to the effect that this is an “old twelve-inch private sewer.”

It appears from the plats of the Department of Water Pipe extension that the City has laid no water mains, but that there is a private six-inch main in the alley.

The Board of Local Improvements reports that no record exists of the alley's having been paved by the City. The fact that it is paved, however, partly with granite block and partly with boards, indicates that the work has been done by private contract. The Ward Superintendent finds, upon investigation, that the City has never made paving repairs in the alley.

The Department of Street Cleaning reports that its men have cleaned the alley two or three times a week for over ten years, but that this was done irrespective of whether it was public or private property, since rubbish and refuse accumu-

lating in the alley would, unless removed, be tracked and blown out into the streets.

D. From the records of the County Clerk it does not appear that the alley was assessed for taxation prior to 1902. Beginning with that year the following proceedings have been had:

1902. Assessed for general taxes. Tax levied, \$262. Sold September 14, 1903, to H. S. Earley. Redeemed August 11, 1905, by Estate of Joseph E. Otis.

1903. Assessed for taxation. Tax levied, \$442.02. Paid by Walter Langlois.

1904. Assessed for taxation. Tax levied, \$332.14. Not paid. Assessment cancelled by Board of Review, August 23, 1905, on complaint of Kate H. P. Roberts, owner of the E. 2-3 of sub-lot 4, and all of sub-lots 5 and 6, and following entry made on records of County Clerk: "Public alley since before the Fire. Judgment refused. (Signed) Peter B. Olsen, County Clerk."

1905. Assessed for taxation. Assessment cancelled by Board of Review.

1906. That part of the alley south of and adjoining sub-lots 1 to 6 inclusive marked exempt by assessors as a public alley. That part of alley east of and adjoining sub-lots 7, 8 and 9 assessed with said lots on application of the owner. Whole tax levied, \$3,167.25. Paid by John M. Durand by B. A. Thorpe, agent.

I. It would seem from the above state of facts that under sections 17-21 of the Act of 1845 (Hurd's Revised Statutes, Chapter 109, Sections 1, 2 and 3), relating to the certifying, acknowledgment and recording of plats and the effect thereof, the plat of subdivision recorded October 7, 1852, by Richard T. Haines, designating the strip of land under discussion as an alley, constituted a valid dedication under the statute. The alley was, therefore, to that extent, a proper subject for the instrument of vacation filed for record September 12, 1856, under Section 3 of the Act of 1847 (Hurd's Revised Statutes, Chapter 109, Section 7), relating to vacation of a part of a plat. This section reads as follows:

"Any part of a plat may be vacated in the manner pro-

vided in the preceding section, and subject to the conditions therein prescribed: *Provided*, such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat: *And provided further*, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law."

The conditions prescribed in the "preceding section" referred to are first, that the vacation shall be before any lots are sold; or, second, if any lots are sold, all the owners of lots in such plat shall join in the deed of vacation. Here the latter of these alternative conditions is complied with since, as already shown, the deed of vacation was executed by the owners of all the lots in the subdivision.

The last qualifying clause of the above-quoted section prohibiting the closing in the manner named of any public highway laid out according to law has been construed by the Supreme Court in the case of *Chicago Pressed Brick Company v. City of Chicago*, 139 Ill., 628, in which Mr. Justice Scholfeld said, at page 633:

"The words 'laid out according to law' have a well-known meaning under our statutes and they plainly include the doing of those things by the proper local officers which are essential in creating a public highway, to authorize it to be worked and traveled, and especially the surveying, marking the course and boundaries, and ordering it established as a highway. The affirmative action of the public authorities is indispensable in such case."

There is, of course, no record of the laying out or surveying of this alley as a public highway during the interval between October 7, 1852, and September 12, 1856, nor, in view of the position of this alley, does it seem possible to show that in such a short time and at such an early day the municipal authorities took any action which could have converted this strip of land into a public highway under the statute. The burden of proving such a laying out by the municipality is upon those seeking to establish this as a public alley. The case of *Littler v. Lincoln*, 106 Ill., 353, is conclusive on this point, in which it is said on page 369:

"Where the plat, if accepted as a conveyance, imposes

the burden on the city authorities to open, improve and keep in repair the streets, the acceptance can not be assumed from the mere proof of execution of the plat. (Citing many authorities.) And it is upon this doctrine that Sections 6 and 7 of Chapter 109 proceed. Where no private rights in the lots or blocks are involved and no public highway has been laid out according to law, no one has an interest which can be adversely affected by the vacation. No trust is, in such case, assumed by the municipality, and no duties which concern the public are imposed upon it. The vacation can, therefore, take from the municipality nothing in the sense of property which belongs to it."

It is well settled that the filling of a statutory plat, designating streets and alleys, must be supplemented by an acceptance on the part of the municipality before there can be a valid dedication. See:

Hamilton v. C. B. & Q. R. R. Co., 124 Ill., 242.

Jordan v. City of Chenoa, 166 Ill., 534.

Reichert Milling Co. v. Freeburg, 217 Ill., 384.

It follows, therefore, that the deed of vacation recorded September 12, 1856, fulfilled the requirements of the statute relating to vacation of plats, and operated to revoke the offer contained in Richard T. Haines' plat, recorded October 7, 1852, to dedicate the alley to the public.

The fee to the alley at the time of this vacation became vested unconditionally in the abutting property owners, since Haines, by conveying lots abutting on the alley before any dedication of the latter had been effected, must be held to have conveyed also his interest in the alley. To this effect see the case of *Hamilton v. C. B. & Q. R. R. Co.*, 124 Ill., 235. Here it appeared that Hamilton and Pearsons recorded a plat in 1835 and sold lots and blocks with reference to the same. The plat showed numerous streets which were, however, never laid out or accepted in any way by the City, and in 1871 the City Council passed an ordinance vacating a portion of the plat. The heirs of Hamilton and Pearsons brought this suit in ejectment to recover those parts of the vacated plat designated thereon as streets, on the theory that the recording of the original plat absolutely vested the fee

of the platted streets in the City, and that when the plat was vacated the fee to the streets shown thereon reverted to the plaintiffs as the heirs of Hamilton and Pearsons. The court held, on page 248:

“The doctrine is that a conveyance of a lot abutting on a highway or street, where there has been no statutory dedication, conveys the grantor’s interest in the street to the center — so that Hamilton’s and Pearsons’s conveyances of the lots (the fee of the streets then being in them) conveyed the fee in the streets to their grantees, and on vacation of the plat there was no interest in the streets to revert to Hamilton and Pearsons, and none did revert to them or their heirs. We hold, in accordance with the doctrine of the *Little* case (*Little v. City of Lincoln*, 106 Ill., 353), that an acceptance is necessary to make a complete dedication under the statute; that until acceptance, the fee does not vest in the municipality, but remains in the original proprietor. Hence a conveyance of the lots before acceptance carries the title to the center of the street.”

From this decision it seems clear that on September 12, 1856, that part of the alley south of and adjoining sub-lots 1 to 6 belonged to the abutting lot owners, each owning to the center line of the alley. That part of the alley east of and adjoining sub-lots 7 to 9, being on the outside edge of the subdivision, belonged entirely to the owners of said sub-lots 7, 8 and 9. The only question remaining therefore is, whether since 1856 there has been a dedication of the alley at common law.

II. As to a dedication at common law, it is said in *City of Chicago v. C. R. I. & P. Ry. Co.*, 152 Ill., 561.

“In order to constitute a dedication at common law it is essential (1), that an intention on the part of the proprietor of the land to donate the same to the public use, and (2) an acceptance thereof by the public, be established by the evidence; and (3), that the proof as to these facts must be *clear, satisfactory, and unequivocal*.”

Also, in *City of Chicago v. Hill*, 124 Ill., 646, on page 652.

“It is of the essence of a dedication that there should be

the intention to make the dedication, and the evidence should be clear either of such actual intention or of such acts or declarations as will equitably estop the owner from denying such intention.”

As evidence showing an intention on the part of the property owners *not* to dedicate the alley, the following facts may be considered :

(a) The owner of that part of the alley east of and adjoining sub-lots 7, 8 and 9 has erected a building extending over the alley, thus occupying it as private property.

(b) Owners of that portion south of and adjoining sub-lots 1 to 6 have built private water mains and sewers.

(c) Such pavement as exists throughout the whole alley has been both laid and kept in repair by private contract.

(d) Owners of most of the buildings abutting on the alley have made excavations under it for storage and boiler room, etc. Similar acts of possession have been held to be strong indication of an intention not to surrender ownership to the public.

City of Chicago v. Borden, 190 Ill., 430, on page 452.

(e) Conveyances of certain lots in the subdivision have expressly included the adjoining alley. Conveyances of the other lots, while not expressly inclusive of the alley, have, in not referring to it, failed to manifest an intention to dedicate.

The above circumstances, taken in connection with the fact that nothing positive appears as tending to show a contrary intention, would seem to dispose absolutely of the idea that there has been even a common-law dedication of this alley.

The circumstance that the alley was not assessed for taxation until 1902 is not material in this connection. In *City of Chicago v. Borden*, 190 Ill., 430, on page 448 it is said :

“The city or the public can not become entitled to a man’s property because no taxes are assessed against it, and because by reason of such non-assessment, no taxes are paid by the owner. If this alley was subject to taxation, it was the duty of the public officers to assess the same and enforce the payment of taxes upon it.”

The action of the City in cleaning the alley would be sig-

nificant only in case there had been a dedication or offer on the part of the owners. There being no offer or intent to dedicate, cleaning the alley does not tend to establish an acceptance on the part of the City. *City of Chicago v. Borden* (*supra*), on page 452. That is, there can be no acceptance of an offer where there is no offer. Even had there been a dedication, however, the cleaning operations would not show an intended acceptance, since they were carried on, as shown above, rather as an exercise of the police power, irrespective of whether the alley was public or private.

III. In the *Borden* case (*supra*) it is clearly stated that, aside from all question of dedication by the owners, a right to an alley as a public alley may be acquired by prescription; that is to say, the City, by a public user and an acquiescence of the owners in such user, together with the exercise of acts of control, may acquire the right to use the alley as a public alley. All the decisions, however, qualify the doctrine by saying that the use and enjoyment of what is claimed must have been "adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land in and over which the easement is claimed." It was also said in the *Borden* case (page 444):

"The only use of the alley as a highway and for purposes of passage and re-passage was by the owners of abutting property and by persons having business with such owners . . . (and on page 446). Where the owners of land devote a portion of it for use as an alley or passage for their own private purposes, such alley or passage will not be converted into a public highway simply because the public also uses it by permission from the owners."

It certainly can not be shown here that the general public has ever used this alley as a thoroughfare or "way of passage." The only possible use for the alley in question is as a means of access for buildings abutting thereon. Its size, shape and position absolutely preclude the assertion that it could ever have been used for through travel. It is said in *Illinois Insurance Company v. Littlefield*, 67 Ill., 368, on page 373:

“The use will be presumed to have been in accordance with the intention of the owner, and when the way is opened as a private passway and that fact clearly appears, it can not be converted into a public highway by the mere use thereof, no matter how long that use may be continued.”

It must therefore be concluded that the alley has never since 1852 ceased to be private property, and that the City Superintendent of Maps properly declined to approve the plat showing it as a public alley.

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

E. C. WETTEN,

First Assistant Corporation Counsel.

AUGUST 26, 1908.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

Replying to your inquiry of recent date, I beg to advise you that your duties, as defined by the telephone ordinance, are as follows:

Paragraph 3 of Section 4 provides:

“The Company shall furnish the City, without charge, throughout the present or any future city hall, or any building or buildings or part or parts thereof used temporarily as a substitute for said city hall, upon written request by the COMMISSIONER OF PUBLIC WORKS, telephone facilities and telephone exchange service of any kind or class furnished by the Company to any of its subscribers at the time of the making of such request, for the use of officers and employees of the City, and upon written request by the COMMISSIONER OF PUBLIC WORKS the Company shall furnish such telephone facilities and service at a discount of twenty-five per cent (25 per cent) from the rates currently charged therefor to the Company’s subscribers, to all present and future municipal buildings and offices (other than the said city hall), or any part or parts thereof, including buildings or offices used in connection with City yards.”

Section 5 of the ordinance provides:

"The Chicago Telephone Company shall, without extra charge therefor to its lessees, subscribers and patrons or the City of Chicago, at all times maintain its plant, system, wires, cables, electrical conductors and other equipment and service at the highest practicable efficiency, and to that end shall promptly adopt and put into use within the City of Chicago all available improved apparatus, appliances, equipment and methods of service, developed in the progress of the art of telephony, which shall have come into common use from time to time, or if experience has shown them to be practicable, and shall furnish the same to its said lessees, subscribers and patrons within said City of Chicago. Said Chicago Telephone Company shall at all times during the period of this grant so operate its plant, system, wires, cables, electrical conductors and other equipment as to give to its said lessees, subscribers and patrons the best service possible under then existing conditions of the art of telephony."

The same section makes it the duty of the Commissioner of Public Works to enforce the provisions of this section in the following words:

"It shall be the duty of the Commissioner of Public Works to enforce the provisions of this section, and any ordinances or resolutions passed pursuant thereto, and he shall report any violations hereof to the City Council."

Paragraph 3 of the same section provides that the telephone company shall from time to time lay out, construct, equip and operate extensions and additions to its present system of wires, cables, etc., and all this work is to be done under your supervision as Commissioner of Public Works. This paragraph reads as follows:

"The said Chicago Telephone Company shall under the supervision of the COMMISSIONER OF PUBLIC WORKS, from time to time, lay out, locate, build, construct, equip, maintain and operate extensions of and additions to its system of wires, cables, electrical conductors, poles and conduits and new exchanges in any part or parts of the City of Chicago for the purpose of supplying all or any of the kinds of service which it is authorized to furnish under this ordinance,

whenever in the judgment of the City Council it is necessary in order to meet any considerable demand of the public, or a portion thereof, for such kinds of service, or any of them, and whenever said City Council shall so require by ordinance or resolution passed not less than thirty (30) days after a request by said City Council, or some officer of the City designated by it, upon said Chicago Telephone Company, to do said work."

Section 6 relates entirely to rates, service and equipment. Paragraph G of this section relates specifically to meters on measured service lines, and is as follows:

"The Chicago Telephone Company shall install in connection with each measured service line of its lessees and subscribers a meter which shall prove effective in actual use for accurately and correctly recording the number of outgoing messages or conversations over said line, and at any time that a practicable meter for use upon the premises of the lessee or subscriber in connection with such line shall be devised and prove effective in actual use for accurately and correctly recording outgoing messages or conversations, as aforesaid, the Company shall install the same in connection with each line of its lessees of and subscribers to measured service upon their premises."

This paragraph further provides that:

"If any question shall arise as to whether any meter or meters hereinabove provided for shall reasonably protect the lessee or subscriber in the counting of outgoing messages, or as to whether or not a practicable meter for use upon the premises of the lessee or subscriber to a measured service line has been devised and proved effective in actual use for accurately and correctly recording outgoing messages or conversations, as aforesaid, such question or questions shall be submitted to the Chairman of the Finance Committee of the City Council, the COMMISSIONER OF PUBLIC WORKS and the Corporation Counsel, who shall together hear such facts as may be presented by the parties to the controversy, and they, or a majority of them, are hereby given the power to decide such question or questions, and to require said Chicago Telephone Company to make such changes in any meter

or meters, or the method of operating the same, as they shall deem reasonably necessary to protect the lessees and subscribers of said Chicago Telephone Company to measured service, and to require the installation by said company of a new meter or meters for use upon the premises of the lessees and subscribers, and to take any other action in the premises which they shall deem reasonably necessary to protect the lessees and subscribers of said company."

Section 10 relates to underground conduits, their construction, the issuing of permits and the restoration of streets, and is as follows:

"The Chicago Telephone Company shall place and keep in underground conduits all the wires, cables and electrical conductors which it may now or hereafter have in or on the streets, within the following boundaries, namely — commencing at the intersection of Lake Michigan and Howard avenue; thence west on Howard avenue to East Ravenswood Park avenue; south to Foster avenue; west to Western avenue; south to Diversey boulevard; west to Kedzie avenue; south to Chicago avenue; west to Fortieth avenue; south to Twenty-sixth street; east to Center avenue; south to Seventy-ninth street; east to Vincennes road; northeast to Seventy-third street; east to Cottage Grove avenue; south to Seventy-ninth street; east to the Baltimore & Ohio Railway tracks; south on the Baltimore & Ohio Railway Company's right of way to Eighty-ninth street; east to Lake Michigan.

"All the underground conduits shall be constructed under the supervision of the COMMISSIONER OF PUBLIC WORKS, or such other officer or department of the City of Chicago as may be hereafter provided by ordinance from time to time. Said Company shall place on file with the COMMISSIONER OF PUBLIC WORKS plans showing the location of each conduit laid and the number of ducts in each conduit, and shall not withdraw the same, and before laying any new conduits said Company shall file with said COMMISSIONER OF PUBLIC WORKS plans showing where each conduit is to be laid, the number of ducts therein, the location of manholes or other openings to gain access to said conduits, and shall not withdraw the same; and each cover for

such manhole or other opening shall have placed thereon the name or initials of said Company, and no conduit, pole, wire or cable shall be erected or laid in any street, alley or other public way, without first obtaining a permit from the COMMISSIONER OF PUBLIC WORKS which shall indicate the time, manner and place of laying or erecting the said conduit, pole, wire or cable.

“When any opening is made or work done in, on or under any street, alley or other public way, for any purpose whatsoever by said Company, said street, alley or other public way shall be restored to a condition satisfactory to the COMMISSIONER OF PUBLIC WORKS at the expense of said Company; and for such purpose the Company shall deposit, and at all times keep on deposit with the COMMISSIONER OF PUBLIC WORKS, a sum of Five Thousand Dollars (\$5,000), to be used for the purpose of restoring such streets, alleys and other public ways to a condition satisfactory to the said COMMISSIONER OF PUBLIC WORKS; and for failure to make such deposit, or keep such sum on deposit when notified by the COMMISSIONER OF PUBLIC WORKS, said Company shall be refused a permit to lay or erect additional cables, conduits, poles or wires.

“The Chicago Telephone Company shall at any time or times during the term of this grant, when directed by the City of Chicago, remove at its own expense, all its underground wires, cables, electrical conductors, conduits, and all other underground construction from any public street, alley or other public way in which any subway or subways is or are about to be constructed, either under the terms of a certain ordinance granting privileges to the Chicago City Railway Company or a certain ordinance granting privileges to the Chicago Railways Company, passed February 11, 1907, or of any ordinance or ordinances supplemental thereto or amendatory thereof, or from any such street, alley or public way in which any subway or subways is or are about to be hereafter constructed under any ordinance hereafter duly passed by the City Council of the City of Chicago, and shall place said wires, cables and electrical conductors in such subway or subways at its own expense, unless such wires, cables

and electrical conductors can be elsewhere provided for in then existing conduits without making street excavations or new underground conduit construction. Any ordinance or ordinances passed by the City Council directing the removal of such wires, cables, electrical conductors and conduits shall grant to said Chicago Telephone Company the right to the occupation and use of space in such subway or subways until the expiration of the rights and privileges hereby granted under the terms of this ordinance, upon the payment of such reasonable compensation and subject to such reasonable terms and conditions for the installation in and occupation or use of space in such subway or subways as shall be fixed by the said Council in such ordinance or ordinances."

It will be noted, in this connection, that as Commissioner of Public Works you have entire supervision in the laying and constructing of these underground conduits, and you are also required to see that the streets are properly restored, and that the company has on deposit with you the sum of five thousand dollars, to be used for the purpose of restoring such streets, alleys and other public ways, to a condition satisfactory to you.

Section 11 relates to overhead wires, the plans for their construction and removal when required by the City of Chicago, and is as follows:

"The said Company, outside of the district mentioned in the foregoing section, may erect, maintain and repair an overhead system of poles, cables and wires, in any of the streets, alleys and public ways in Chicago, but before any such poles shall be so erected, maintained or repaired, the plans thereof shall be submitted to the COMMISSIONER OF PUBLIC WORKS and he shall determine the size and character of the poles to be used for such purpose, and the height from the streets, alleys, or other public ways at which such wires or cables shall be placed, and the streets, alleys or other public ways upon which said poles shall be placed; and so far as is deemed practicable by the COMMISSIONER OF PUBLIC WORKS all poles, overhead wires and cables permitted in the City shall be placed in alleys. Any poles, cables or wires, or any line or lines of poles, cables or wires now standing, or

hereafter erected in any street, alley or public way within the City of Chicago, shall be removed from said street, alley or public way, and said wires or cables placed under ground therein, in advance of paving or repaving, upon the order of the COMMISSIONER OF PUBLIC WORKS. Whenever in such case in the judgment of the COMMISSIONER OF PUBLIC WORKS it shall be for the interest of the City of Chicago that such overhead wires or cables, or any line or lines of cables or wires, or any of them, shall be placed under ground, he shall so order it, and upon a receipt of such order by the Chicago Telephone Company, or its successors, or assigns, said Company, or such successors, or assigns, shall without delay place under ground the wires or cables as ordered. Should said Company fail to place any wires or cables under ground as provided in this ordinance, then the DEPARTMENT OF PUBLIC WORKS shall have the right (at the expense of the Company) to take down and remove all poles, wires and cables of said Company which may be above ground in violation of the provision of this ordinance, or place such cables and wires under ground."

It will be noted that before any poles are erected the plans therefor shall be submitted to you, and you shall determine the size and character of the poles to be used and the height of wires from the street and the location of the poles. You also have authority to order any poles, cables or wires now existing or hereafter to be erected in any public way to be removed and said wires placed under ground.

Section 12 relates to overhead distribution from conduits and under sidewalks, and is as follows:

"Wherever in the City of Chicago the above-mentioned wires, electrical conductors and cables are placed under ground, except within the area bounded by Lake Michigan, Twelfth street and the Chicago River on the north and the South Branch thereof on the west, the said Company shall for the purpose of reaching its subscribers and branch offices, have the privilege of bringing its wires, conductors and cables to the surface, and of making overhead local distribution to reach such subscribers, and in so doing may cross streets, alleys and other public ways, but it may place poles for dis-

tribution only on streets where there are no alleys; provided, however, that such wires, conductors and cables shall not be strung overhead to exceed two blocks in length or three blocks extending from the central office and one block extending toward the central office from any underground connection; said Company in making underground local distribution to reach its subscribers within the area last mentioned shall, so far as is deemed practicable by the COMMISSIONER OF PUBLIC WORKS, place its said wires, conductors and cables under sidewalk space. Provided, that the COMMISSIONER OF PUBLIC WORKS in his discretion is directed to permit said Company to lay its wires, conductors or cables under the street pavement next outside the curb wall instead of under the sidewalk abutting upon or around any property, if he deems it convenient or necessary, and in such case the COMMISSIONER OF PUBLIC WORKS shall issue permits for such purpose, specifying that the said wires shall be laid in such manner as to least inconvenience any person occupying the space underneath the sidewalk adjoining said curb wall, and he shall require that the same be made entirely safe and secure."

In this section you are vested with the discretion to permit the Company to lay its wires, conduits or cables next outside the curb walls instead of under the sidewalk abutting upon or around any property, should you deem it convenient or necessary.

Section 13 relates to stringing wires over buildings and securing the consent of the owners, and is as follows:

"Whenever the said Company erects its wires, cables or electrical conductors over or above any building within the City, with the consent of the owner or owners thereof, said wires, cables or electrical conductors shall be kept at least eight (8) feet above the surface of the roof of such buildings, except in such buildings as the wires are to enter, and all wires, cables and electrical conductors erected above or over buildings or any private property, shall be strung as directed by the COMMISSIONER OF PUBLIC WORKS."

As to complaints—In all instances where you are charged with a specific duty, as indicated in the above, where

your attention is directed to it, whether by employees of the city or citizens, it is your duty to see that the telephone company complies with the provisions of the ordinance, not only to enforce the provisions of the ordinance as specifically set out herein, but to enforce the provisions of any ordinances or resolutions passed by the City Council pursuant to this ordinance; and where there is a flagrant violation of the provisions of the ordinance—such as the failure of the company to adopt improvements or to make all necessary extensions—it is your duty to report the same to the City Council.

As to general complaints, such as the failure of a citizen to secure what he regards as a prompt installation of his phone, or what he regards as inadequate or grossly inefficient service, no city official is directly charged with a consideration of these matters. In this connection, I might say that they appear to be made in various ways, but most of them find their way to this department. We have simply referred them direct to the Telephone Company, and up to this time have found that they not only give the complaints prompt attention, but in nearly every instance the subscriber seems to be satisfied.

Yours very truly,
 EMIL C. WETTEN,
First Assistant Corporation Counsel.

SEPTEMBER 3, 1908.

MILTON J. FOREMAN, Esq., Chairman Local Transportation Committee.

Dear Sir:

At your request and by the direction of the Corporation Counsel I have investigated certain questions relating to the elevated railroad situation in Chicago and make this preliminary report:

I transmit, with this report, a digest of all the "loop" grants, and of the grants to the Northwestern Elevated Railroad Company. I expect soon to have completed, in a form suitable for use by your committee, a digest of all the other elevated railroad ordinances. I am sending you herewith a list of grants to elevated railroads in Chicago, from which you

will see that there are more than forty different ordinances and orders which have been passed by the City Council, all relating to the present elevated railroad companies or their predecessors.

The elevated railroad companies which are to-day actively engaged in business in Chicago are the South Side Elevated Railroad Company, the successor of the Chicago & South Side Rapid Transit Railroad Company; Chicago & Oak Park Elevated Railroad Company, formerly known as the Lake Street Elevated Railroad Company; Metropolitan West Side Elevated Railway Company, the successor of the Metropolitan West Side Elevated Railroad Company, and the Northwestern Elevated Railroad Company.

The South Side Elevated Railroad Company received its grant from the city in an ordinance passed March 26, 1888, and accepted May 24, 1888. This ordinance granted to the Chicago & South Side Rapid Transit Railroad Company permission and authority to construct, maintain and operate for a period of fifty years an elevated railroad with two or more tracks, not exceeding three, and requisite appliances, along a route in the City of Chicago beginning at the north line of Van Buren street between Dearborn street and Wabash avenue and running thence southwardly between Dearborn street and Wabash avenue to a point between the north line of Thirty-seventh street and the south line of Thirty-ninth street, thence eastwardly or southeastwardly to a point to be selected by said company between Dearborn street on the west and Forest avenue on the east, crossing the city limits at this latter point. This ordinance was amended by another ordinance passed April 2, 1891, and accepted April 11, 1891, which changed the route south of Thirty-seventh street and authorized certain branches. A further amendatory ordinance was passed April 7, 1892, and accepted April 18, 1892. This latter ordinance referred only to a portion of the railroad on Sixty-third street.

Bonds were issued to aid in the construction of the railroad authorized by these ordinances, and to secure the payment of the bonds a mortgage on the property and franchise was executed, which was afterward foreclosed. The property

was purchased at the foreclosure sale by Leslie Carter and his associate, and afterward was by them transferred to the South Side Elevated Railroad Company.

The Metropolitan West Side Elevated Railway Company is operating under a grant to the Metropolitan West Side Elevated Railroad Company passed April 7, 1892, and accepted April 16, 1892, and under various subsequent ordinances granting extensions. The ordinance of April 7, 1892, gave to the Metropolitan West Side Elevated Railroad Company permission and authority to construct, maintain and operate for a period of fifty years an elevated railroad with two or more, but not exceeding four tracks, from the east line of Fifth avenue between Jackson street and West Congress street extended, west across the Chicago river to Sacramento avenue, and from there in a westerly direction to the city limits, with three branches.

The Metropolitan West Side Elevated Railroad Company issued bonds in aid of the construction of its railroad, and to secure the payment of the same executed a mortgage on its property and franchise. This mortgage was afterward foreclosed and the property purchased at the foreclosure sale by Frederick P. Olcott, trustee, who afterward conveyed to the Metropolitan West Side Elevated Railway Company.

The Chicago & Oak Park Elevated Railroad Company, which was formerly known as the Lake Street Elevated Railroad Company, is operating under two ordinances, both passed November 24, 1890, and accepted December 24, 1890, granting to the Lake Street Elevated Railway Company permission and authority to build, construct and maintain an elevated railroad with a double track on Lake street from the west line of Canal street to Crawford avenue and from Crawford avenue west to the city limits; the latter ordinance also granted the right to construct a railroad from the west line of Canal street to the east line of Market street. These ordinances were assigned to the Lake Street Elevated Railroad Company August 30, 1892, and thereafter accepted by the assignee company. May 15, 1893, an ordinance was passed granting to the Lake Street Elevated Railroad Company the right to build a branch along Market street to the south line of

Madison street and also other branches which have not been built. The name of the Lake Street Elevated Railroad Company was afterward changed to the Chicago & Oak Park Elevated Railroad Company.

The Northwestern Elevated Railroad Company is now operating under an ordinance passed by the City Council January 8, 1894, and accepted January 13, 1894. This ordinance gave permission and authority to the Northwestern Elevated Railroad Company to construct, maintain and operate, for a period of fifty years, an elevated railroad with branches and with two or more tracks, not exceeding four, with necessary appliances from Monroe street or from a street or point north of Monroe street between Wabash avenue and Market street in a northerly or northwesterly direction to the city limits with five different branches therein specified. Other ordinances granting the right to extend to Ravenswood and to extend its line on North Water street from Wells to North Clark street have been recently passed. In addition to owning and operating its main line from the central part of the city to Wilson avenue and thence over the Chicago, Milwaukee & St. Paul Railway Company's tracks to Evanston, the Northwestern Elevated Railroad Company now owns the "Union Loop."

The Union Loop was constructed under four different ordinances; the first ordinance was one granting to the Lake Street Elevated Railroad Company the right to construct, maintain and operate an elevated railroad with two tracks on Lake street from the east line of Market street extended, to the east line of Wabash avenue. This ordinance was passed October 1, 1894, and accepted October 3, 1894. The ordinance provided that the railroad should be used exclusively for passenger traffic and the mails; that the trains should be regularly and systematically run at such intervals as would accommodate the public and the number of trains and the frequency should be increased as the demands of the public should render necessary and the increased traffic warrant.

The next loop ordinance was an ordinance granted to the Northwestern Elevated Railroad Company, passed June 24, 1895, and accepted August 19, 1895. This ordinance was,

in terms, an ordinance amendatory of the ordinance passed January 8, 1894. It gave authority to the Northwestern Elevated Railroad Company to operate its railroad and branches with two tracks and necessary appliances on Fifth avenue from the Chicago river south to the north line of Harrison street. It was provided in and by the ordinance that the portion of the railroad south of Lake street should be subject to the joint use of the Northwestern, Lake Street, Metropolitan, South Side and Union Elevated Railroad Companies, "under any and all contracts now existing or which may hereafter be entered into between the said companies or any of them," and also provided that the Fifth avenue side of the loop should be by the Northwestern Elevated Railroad Company leased to, constructed and maintained by the Union Elevated Railroad Company for the joint use of the companies mentioned. The provision of the ordinance of January 8, 1894, which made the grant conditional on the road carrying passengers and mails exclusively apply also to this grant, so also the provision requiring the service to be adequate to public demands and increase of traffic. Upon the passage of this ordinance the Mayor refused to approve it unless the Northwestern Elevated Railroad Company would enter into an agreement in consideration of the approval by the Mayor of the ordinance, under which agreement the company would rebuild and enlarge the Wells street bridge, and maintain and repair it thereafter, and under which it agreed to pay into the city treasury all car licenses and other payments provided in the ordinance of January 8, 1894; that it should light all street and alley crossings south of the Chicago river, and other provisions which need not now be mentioned. This agreement was executed by the company and the Mayor approved the ordinance.

The next loop grant was a grant made to the Union Elevated Railroad Company by ordinance passed October 14, 1895, and accepted October 21, 1895. This ordinance gave to the Union Elevated Railroad Company permission and authority to construct and maintain an elevated loop for the period of fifty years on Wabash avenue from the north line of Lake street to the south line of Harrison street, with the right to

connect and operate in connection with the elevated railroad on Lake street, and also with the South Side Rapid Transit Railroad Company. It is provided by this ordinance that the railroad should be used for handling passenger traffic and the mails exclusively, and that all trains be regularly and systematically moved as should be necessary to accommodate the public, and the number of all trains should be increased as rapidly as the demands of the public should make necessary, and the increase of traffic warrant.

The next loop grant was a grant to the Union Consolidated Elevated Railway Company made by ordinance passed June 29, 1896, and accepted July 6, 1896. This ordinance gave permission and authority to construct and maintain, for a period of fifty years, an elevated railroad on Van Buren street from Wabash avenue, connecting at that point with the tracks of the Union Elevated Railroad Company, thence west along Van Buren street to a point two hundred feet east of Halsted street connecting with the tracks of the Metropolitan West Side Elevated Railroad Company, with a branch on Market street, and with the right to connect with the tracks of the Union Elevated Railroad Company on Fifth avenue "for the operation of the Loop System." This ordinance provided that the road should be used for passengers and the mails exclusively, and for violation of this provision the grant becomes "null and void."

It is provided that the part of the elevated structure between Wabash avenue and Fifth avenue should be subject to the joint use of the Northwestern, Lake Street, Metropolitan, South Side and Union Companies, "upon such terms and conditions as may have been agreed upon in any and all contracts now existing, . . . or such contract or contracts as may hereafter be entered into between the said companies, or any of them, for the use and operation of the said railroad." It is provided, also, that the grantee should run its trains throughout the night at regular intervals of not more than thirty minutes; that all trains should be regularly and systematically moved and the number of trains should increase with the increased demands of the public. This ordinance the Mayor was unwilling to sign without additional stipulations

on the part of the company and the payment by the company to the city of a certain amount of the gross receipts of the company. Whereupon a contract or agreement supplemental to the ordinance was executed by the Union Consolidated Elevated Railroad Company and by the Union Elevated Railroad Company. It provided, among other things, for the payment to the city by whoever should control and operate the loop line of certain percentages of the gross receipts ranging from five per cent from 1897 to 1901, to twenty-five per cent from 1931 to the end of the term, providing that in case there was a default in the payment continuing for thirty days all rights and privileges under the ordinance should thereupon "absolutely cease and determine at the election of said city." The agreement provided also that the loop line was to include all of the elevated structure on Wabash avenue, Van Buren street, Lake street and Fifth avenue as it now exists.

It will be seen that these ordinances make provision for a continuous loop, beginning at Fifth avenue and Lake street, thence east to Wabash avenue, thence south to Van Buren street, thence west to Fifth avenue, thence north to the place of beginning. Express provision for the connection of the various portions of the loop was made in the ordinances for all junctions except Fifth avenue and Lake street, but inasmuch as the Northwestern and Lake Street roads cross at this point, and as in the three later ordinances it clearly appears that the City Council had in mind the ultimate construction and operation of a loop, and inasmuch as the grant to the Northwestern Elevated Railroad Company of the authority to build the Fifth avenue side of the loop expressly provided that it should be subject to the joint use of the various elevated railroad companies under all contracts then existing, or which might hereafter be entered into between the companies, and since contracts providing for the operation of the loop in one continuous route have been made, I am of the opinion that authority to make the loop connection at Fifth avenue and Lake street may be implied, inasmuch as the evident purpose of the ordinances was to provide for the maintenance of the loop as a continuous structure.

LOOP LITIGATION.

October 20, 1903, the Northwestern Elevated Railroad Company filed a bill against the City of Chicago and the Commissioner of Public Works to enjoin the City and the Commissioner from interfering with the extension of loop platforms on Fifth avenue, Van Buren street and Wabash avenue. The extension of these platforms had been begun by the complainant under permit issued by the Commissioner of Public Works.

Briefly, the bill sets up the various loop ordinances, and avers that the Northwestern Elevated Railroad Company has succeeded to the rights, privileges and franchises of all the other loop companies. The bill then alleges the building and construction of the Union Loop, and that it is necessary, because of the increase in traffic, to extend the loop platforms; that it obtained a permit so to do from the Commissioner of Public Works, which was afterward revoked.

The prayer is for a decree finding the right in the complainant, under the ordinances set up in the bill, to extend its platforms; that the revocation of the permit be declared void, and that the City and Commissioner of Public Works be enjoined from interfering with the extension of the platforms.

The Commissioner of Public Works filed an answer admitting the passage of the ordinances and the issuance of the permit, and alleging that the permit had been issued under a misapprehension, and upon learning the fact that the lengthening of the platforms would unnecessarily impair the usefulness of the streets he revoked the permit. The city at first demurred to the bill, but afterward, upon leave of court, withdrew the demurrer and filed an answer. The answer sets up the invalidity of the loop ordinances, because the City Council did not have jurisdiction to pass them, for the reason that a sufficient petition of the majority of owners of frontage on the various loop streets was not presented; that, although the elevated railroad companies to which loop grants were made are organized under the General Railroad Law of the State, they are, nevertheless, subject to certain provisions of the Horse and Dummy Act, and that no notices of the pre-

sentation of the petitions asking for the various grants were published in accordance with the provisions of Section 3 of the Horse and Dummy Act.

The answer further sets up that the city had no power to grant authority to the railroads to erect stations in the public streets to be used for commercial purposes. It is also alleged that the railroads have not built their lines between the termini fixed in the various ordinances.

The city also filed a cross bill on December 17, 1903, which later was amended, and the amended and supplemental cross bill was filed on June 29, 1906. This cross bill sets up in detail and at length the points raised in the city's answer, and attacks the rights of the companies to maintain the loop, upon the grounds set up in the answer. To this amended cross bill demurrers were filed by the South Side Elevated Railroad Company, Union Consolidated Elevated Railroad Company, Central Trust Company, George Sherman, Illinois Trust & Savings Bank, Northern Trust Company, American Trust & Savings Bank, Metropolitan West Side Elevated Railroad Company, Union Elevated Railroad Company and the Chicago & Oak Park Elevated Railroad Company. These demurrers have not been disposed of.

The Northwestern Elevated Railroad Company filed two pleas to a portion of the amended and supplemental cross bill of the city, and demurred to the balance. The first plea is a plea of *res adjudicata*. The plea sets up the bill filed against the city, and others, by Rothschild & Company, to enjoin interference by the defendants with the platform connection from the Rothschild store to the loop line on Van Buren street, near State street. In their answer to this bill the City of Chicago, the Mayor and the Commissioner of Public Works, among other averments, "admit that said several ordinances . . . are and were valid contracts between the said corporations and the City of Chicago" (referring to the several "loop" ordinances). The decree in the case, as set up in the plea, finds that the ordinance of January 8, 1904, to the Northwestern Elevated Railroad Company, the ordinance of June 29, 1896, to the Union Consolidated Elevated Railroad Company, the ordinance of October 1, 1894, to the Lake Street

Elevated Railroad Company, the ordinance of June 24, 1895, to the Northwestern Elevated Railroad Company, and the ordinance of October 14, 1895, to the Union Elevated Railroad Company (the last four of which ordinances are "loop" ordinances) were duly passed and accepted "and were . . . and are now in full force and effect." This decree enjoined the city and the other defendants from interfering with the Rothschild station platform, and it was finally affirmed by the Supreme Court.

Rothschild & Company v. City of Chicago, 227 Ill., 205.

The second plea is a plea of estoppel. This plea sets up the various contracts and agreements between the elevated railroads, and the various leases which have been executed. It then sets up payments to the City of Chicago from 1898 to 1906, aggregating \$181,028.50. It further sets up many ordinances, orders, permits and communications from the Mayor and the Corporation Counsel affecting, referring to, or recognizing the existence of the loop or the loop grants. The plea also alleges the expenditure by the Northwestern Elevated Railroad Company, and its predecessor loop companies, of large sums of money upon the faith of the validity of these franchises, the issuing of bonds and the sale of these bonds to innocent holders for value.

Certain intervening property holders constituting the so-called Loop Protective Association also filed a cross bill setting up practically the same things as are contained in the city's cross bill.

December 21, 1903, the motion of the Northwestern Elevated Railroad Company for a preliminary injunction came up before Judge Tuley, and on February 8 he rendered an opinion in which he stated that, inasmuch as the grant was for an obstruction above the level of the street, the Council must have intended to limit the grant to erect platforms and the like to the original construction; that after the companies had constructed their platforms in the first instance nobody except the Common Council had authority to grant to the companies the right to extend their platforms, and on February 25, 1904, an order was duly entered denying the pre-

liminary injunction. Nothing further has been done in this case.

On the part of the city the important steps to be taken are to have the two pleas and the demurrer of the Northwestern Elevated Railroad Company and the demurrers of the other defendants to the city's cross bill set down for hearing. On the part of the property owners the next step in the litigation will be to secure a rule upon the Northwestern Elevated Railroad Company to answer, plead or demur to their cross bill. Not having been able, as yet, to make an exhaustive study of the authorities, I do not now venture to give any opinion on the question of the validity of the pleas of the Northwestern Elevated Railroad Company. I do think, however, that each of these pleas presents difficult questions for the city. Nevertheless, such fundamental grounds for the revocation of the grants are set forth in the cross bill of the city that unless your committee shall otherwise direct, I see no reason why the suit should not be pushed.

There is pending, also, in the Circuit Court, another important suit in which is involved the question of the rights of the Metropolitan West Side Elevated Railway Company to run its share of trains around the loop. The Metropolitan Company filed a bill on August 9, 1907, against the other tenants of the loop and against the Northwestern Elevated Railroad Company, as owner and lessor, to enjoin the defendants from denying to the Metropolitan Company its proportionate share of the use of the loop, as provided in and by Paragraph 2 of Section 7 of the loop lease. The City of Chicago is also made a party defendant.

Paragraph 2 of Section 7 of the loop lease provides that "when the capacity of the loop is not sufficient to accommodate all of the trains of the lessees, each lessee shall be entitled to operate upon the loop such proportion of the total number of trains operated thereon as the number of paying passengers carried by said lessee bears to the number of paying passengers carried by all the lessees."

The bill also asks for a construction of other sections of the lease and for an accounting; that the decree also determine the capacity of the loop, and that the presidents of the

Northwestern Elevated Railroad Company and of the Chicago & Oak Park Elevated Railroad Company be restrained from acting as members of the Board of Managers of the loop. To this bill the South Side Elevated Railroad Company filed an answer. The Northwestern and the Chicago & Oak Park Companies filed demurrers. These demurrers came on for hearing before Judge Carpenter, and May 19, 1908, the demurrers were overruled. Judge Carpenter handed down a written opinion, which is set out in full in the memoranda of this suit which accompanies this report. Briefly, he held that the public interest in the subject matter was sufficient, and that there was a sufficient mutuality in the loop contract or lease to give complainant the right to specific performance on the facts set out in the bill. He also held that the bill was not multifarious. Thereafter the Northwestern and the Oak Park Companies filed answers denying most of the material allegations of the complainant, and the Oak Park Company sets up the claim that it is entitled to run all its trains around the loop. Replications to these answers were filed and the case has been referred to Granville W. Browning, Esq., Master in Chancery, to take proof. No proofs, however, are to be taken until after vacation is over.

With the approval of the Corporation Counsel I have decided to ask leave of court to file an amended answer on behalf of the city, setting up the invalidity of the loop grants substantially as they were set up in the other suit. It may be necessary also to file a cross bill with allegations similar to those in the cross bill filed in the former suit.

OTHER QUESTIONS.

1. All the existing elevated railroad companies, the Northwestern, the Chicago & Oak Park, the Metropolitan and the South Side Elevated, are incorporated under the General Railroad Act of Illinois, and are subject to the terms and provisions of that act, and to the terms and provisions of the constitution and statutes on the subject of railroad companies as common carriers of freight and passengers. Each one of these companies is expressly restricted by the terms of its grant from the city to the carrying of passengers and the

mails exclusively, and having accepted the ordinances the various companies by their own act have disabled themselves from carrying freight upon their present structures.

Section 12, Article XI of the Illinois Constitution of 1870 is in part as follows:

“Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law.”

Section 84, Chapter 114, Hurd’s Revised Statutes, provides:

“Every railroad corporation in the State shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freight; and shall take, receive, transport and discharge such passengers and property, at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight,” etc.

Under these provisions of the constitution and of the statutes, respectively, the Supreme Court has held that “all railway corporations incorporated under the General Railroad Incorporation Act *must* engage in the carrying of both passengers and freight.”

Litchfield & Madison Ry. Co. v. People, 222 Ill., 242.

The case cited was a mandamus suit instituted in the name of the people, praying that a writ of mandamus be issued to compel the defendant railway company to carry passengers over its railroad. The writ was issued by the lower court and the judgment was affirmed by the Supreme Court.

In *People v. S. T. L. A. & T. H. R. R. Co.*, 176 Ill., 512, which was a mandamus proceeding to compel better passenger service, the court, citing the constitutional and statutory pro-

visions above quoted, said that railroads must carry both passengers and freight.

In giving this opinion I am not unmindful of two cases apparently holding that a corporation organized under the General Railroad Act may be absolved from its obligation to carry freight: *Lieberman v. Chicago South Side Rapid Transit R. R. Co.*, 141 Ill., 140; *Gillett v. Aurora Railways Co.*, 228 Ill., 261. Both of these cases were condemnation cases. In the first case the question was whether or not the railroad company could show, as affecting the question of damages, the fact that its ordinance permitted it to carry passengers only. It was held that such fact could be shown, and the court said that under its articles of incorporation the structure of petitioner could be used for passengers only or freight only. In the *Gillett* case the point was raised that the Railways Company, being organized under the General Railroad Act, could not operate a railroad carrying only passengers on the street; that having agreed so to do it could not avail itself of the Eminent Domain Statute, and the court there said that a railroad corporation lawfully occupying a street need not haul freight through the street. Both of these cases, as I understand them, simply hold that a corporation incorporated under the General Railroad Act of Illinois, may, upon a certain part of its structure, carry passengers only, but neither of the cases go so far as to lay down the rule that under any circumstances such a railroad corporation can be absolved from its obligation to carry passengers and freight.

Another phase of this question suggests itself, namely: whether the various franchise ordinances which have been accepted by the elevated railway companies are contracts which disable the companies from performing their public functions, and hence contrary to public policy and void.

Union Traction Co. v. Chicago, 199 Ill., 542.

I am not now prepared to express an opinion on this point. I simply mention it as it suggests itself to me. If there is anything in this point it can probably be tested by an information in the nature of a bill in chancery brought in the name of the people by the Attorney-General, or by the State's Attorney, or by a bill in chancery brought by the city.

Doane v. The Lake Street Elevated R. R. Co., 165 Ill., 510.

Metropolitan Street Ry. Co. v. Chicago, 96 Ill., 620.

McCartney v. Chicago & Evanston R. R. Co., 112 Ill., 611.

Hunt v. Horse & Dummy Ry. Co., 121 Ill., 638.

C. B. & Q. Ry. Co. v. Quincy, 136 Ill., 489.

2. It will be remembered that after the passage of the loop Northwestern Elevated Railroad Company ordinance on June 24, 1895, and the Union Consolidated Elevated Railroad Company ordinance on June 29, 1896 (both loop ordinances), the Mayor refused to sign them unless the companies would make certain covenants and agreements with the city. These agreements and covenants modify the ordinances and in both cases it may be said that they also impose upon the grantee additional burdens or obligations. In fact both of these agreements seem to me to amount to amendments of the ordinances. The agreements were executed in both cases, presented to the City Council by the Mayor and ordered published and placed on file, and the Mayor thereupon in each case signed the ordinances. The reception by the Council of the agreements transmitted by the Mayor and the order to publish and file the agreements can not be considered more than a Council order. It is elementary, of course, that a Council ordinance can not be amended by an order or a resolution.

McQuillan Municipal Ordinances, page 195.

Hibbard, Spencer, Bartlett & Co. v. Chicago, 173 Ill., 91.

C. & N. P. R. R. Co. v. Chicago, 174 Ill., 439.

People v. Mount, 186 Ill., 560.

If these agreements, therefore, be considered as amendments to the ordinances they would appear to be void, and, conceding that it is proper for the Mayor to approve a franchise ordinance on consideration that the grantee will execute a contract, if the contract is void, then there is no consideration for this approval of the ordinance, and hence the ordinance passed, having never been approved, is void. This suggests another question, and that is, whether or not an act of the Mayor in approving an ordinance where the approval is induced by a consideration outside of the ordinance itself can be valid. The Common Council is the only body entrusted

by law with the power to pass ordinances. When an ordinance is presented to the Mayor it would seem that it is his duty to act upon the ordinance as it stands, and that if the ordinance as it stands before him as passed by the Common Council does not meet his approval, it is his duty to veto it or to present a substitute ordinance. It would seem that the people are entitled to have the free and untrammelled judgment of the Mayor upon the acts of the Council, and that the Mayor ought not to approve an ordinance that he believes to be bad because somebody will agree to do something which in his opinion obviates some of the objectionable features of the ordinance. A question similar to this came up in the United States Circuit Court for the Northern District of Illinois in the case of *Potter, Receiver, v. Calumet Street Electric Railway Co., et al.* It seemed that the City Council of Chicago passed an ordinance granting the Calumet Company a franchise. The Mayor was unwilling to approve the ordinance granting this franchise unless the company would make certain payments, and the company thereafter executed and delivered an agreement to pay \$50,000 to the city in certain installments running through a period of years. Thereupon the Mayor approved the ordinance. Eighteen thousand dollars became due and the City of Chicago petitioned the court for an order directing the receiver to pay this amount. Of course, in this case, the question of the validity of the ordinance to the Calumet Company was not questioned by the city, and in deciding a preliminary motion in the case Judge Sanborn seemed to be of the opinion that in case the Calumet Company actually used its franchise it would have to pay the compensation. That, of course, was far from deciding that the ordinance was valid. As yet I have found no decided case involving the exact points here raised, but in view of the well settled rules of law suggested above, I am of the opinion that the city would be justified in urging this point before the courts.

3. The grants to the Union Consolidated Elevated Railway Company, the Lake Street Elevated Railroad Company, the Northwestern Elevated Railroad Company, the Union Elevated Railroad Company, and the Metropolitan West Side

Elevated Railroad Company, require the painting of the supporting columns and of the superstructure by the companies. These ordinances generally require that the painting should be in light tints. I am advised that the companies have not complied with this provision of their ordinances.

On October 28, 1899, the Hon. Charles M. Walker, then Corporation Counsel, addressed an opinion to the City Council in which he stated that in his opinion the elevated railway companies could not be required to paint their structures *white* in the business district of the city. He based this opinion upon the grounds that there was no such provision in the ordinances and that the police power of the city did not extend so far as to give the City Council the power to pass an ordinance requiring the elevated railways to paint their structure white, but there can be no doubt but that in cases where the ordinances require it, painting in compliance with the terms of the ordinances must be done by the companies.

4. Most of the elevated railway ordinances require drip pans to be placed underneath the elevated structure where the same crosses the public street or highway. I am not advised whether or not this provision has been complied with.

5. I am advised that the companies, or their lessees or licensees, maintain news and cigar stands at stations which are erected over the public streets or alleys. I think it is clear that the companies have no right or authority to operate or to permit others to operate such stands. There is no authority in the ordinance for the operation of such stands, and I believe it to be well settled that the City Council has no power to authorize the maintenance of such stands over or upon the public streets of the city.

6. The companies have no right under their ordinances in cases where their stations are over streets or public highways to post or permit the posting of advertising signs. An opinion of the Corporation Counsel to this effect was rendered June 20, 1902.

7. All the loop ordinances, and the other ordinances as well, except the South Side ordinance, provide, substantially, that trains shall be run regularly and systematically at such intervals as shall be necessary to accommodate the public and

that the number of trains and their frequency be increased as rapidly as the demands of the public shall render necessary and the increase of traffic warrant.

Lake Street E. R. R. Co. Ordinance October 1, 1894, Sec. 4.

Northwestern E. R. R. Co. Ordinance January 8, 1894, Section 5.

Union Consolidated E. R. R. Co. Ordinance October 7, 1895, Sec. 3.

Union Elevated R. R. Co. Ordinance October 14, 1895, Sec. 3.

Metropolitan W. S. E. R. R. Ordinance April 7, 1892, Sec. 5.

In the petition of the Metropolitan West Side Elevated Railway Company, in the case now pending in the Circuit Court, involving the question of the right of the Metropolitan Company to run its share of trains on the loop, it is alleged that the traffic upon the railroads of the loop tenants has tremendously increased, and that during the "rush hours" the capacity of the loop is not sufficient to accommodate all the trains and all the passengers of the four elevated railroads.

In a report made by Bion J. Arnold to your committee, November 19, 1902, it is stated that the capacity of the loop, as it is constructed, is insufficient to accommodate properly the necessary number of trains, and in that report it is suggested that some relief could be had by lengthening the station platforms. As was stated above, the loop lease under which the four tenant companies operate their trains on the loop at present provides that when the maximum capacity of the loop has been reached each tenant road shall be entitled to operate upon the loop such proportion of the total number of trains operated thereon as the number of paying passengers carried by it bears to the number of paying passengers carried by all the lessee roads.

The Board of Managers of the loop have never determined whether the capacity of the loop has been reached. One of the points made by the Northwestern Company in its answer to the bill of the Metropolitan Company is that the other lessee companies are not entitled to any particular number of trains

upon the loop until the question of its capacity has been determined by the Board of Managers. As a matter of fact, however, I suppose it is safe to assume that the capacity of the loop during the rush hours has been reached, and that during those hours the successor of the various loop companies is unable to fulfill the requirements of the ordinances in respect to running a sufficient number of trains at intervals frequent enough to accommodate the public.

Under the ordinances as construed by Judge Tuley the platforms can not be extended without a new grant by the City Council. As far as I have been able to learn no other plans for relieving the situation except through routing of trains and the use of stub terminals have been suggested. There is, therefore, a clear failure on the part of the successor of the grantees of the various loop ordinances to keep a most important provision of the ordinances. If the city has power to control or regulate the operation of cars or trains upon the loop, it will be powerless to do anything during the rush hours because the present loop structure is not adequate under the present system of routing the trains.

Has there been such a failure upon the part of the successor of the grantees of the various loop ordinances to comply with the terms of the ordinances in this respect that the city has power to say to the Northwestern Company that it must either comply or take its structure off the streets? Has the city power, under the ordinances or otherwise, to compel another and different routing of the trains? These are questions upon which I am not prepared at present to give an opinion without a further study of the authorities. These and other questions growing out of the same state of facts I shall make the subject of a special report to your committee.

I am enclosing herewith certain memoranda which may be of service to your committee:

- a. List of grants to elevated railroads in Chicago.
- b. Digest of loop grants.
- c. Digest of all ordinances to the Northwestern Elevated Railroad Company.
- d. Memoranda on the subject of the loop platform litigation, including a portion of Judge Tuley's opinion.

e. Memoranda on the subject of the litigation involving the capacity of the loop, including the opinion of Judge Carpenter.

The digests which I have prepared have been prepared on the following plan :

- I. Grant.
- II. Dates of Grant and Acceptance.
- III. Term.
- IV. Route.
- V. Compensation.
- VI. Principal provisions.
 1. Service.
 2. Stations.
 3. Platforms.
 4. Motive Power.
 5. Noise.
 6. Fuel.
 7. Smoke.
 8. Drippings.
 9. Painting and Cleaning.
 10. Lighting of Streets Under Tracks.
 11. Rate of Fare.
 12. More Important Plans and Specifications Prescribed.
 13. Assignability.
 14. Other Provisions.
- VII. Express Conditions.
- VIII. Rights Expressly Reserved to Itself by the City.
- IX. Miscellaneous.

This plan is not scientific, but it has seemed to me to be helpful.

Yours very truly,

EDWIN H. CASSELS,
Assistant Corporation Counsel.

Approved :

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 12, 1908.

JOHN HAINES, Esq., Hyde Park Police Station.

Dear Sir:

Answering your recent inquiry as to the present status of Washington avenue from Forty-ninth street, south; the jurisdiction of the City of Chicago over it; the authority and power of the police to enforce the limitations of its use to that of a pleasure driveway and arrest those who persist in disregarding them; and under what statute or ordinance persons so arrested should be booked, permit me to advise that by virtue of an act entitled "An act to provide for pleasure driveways in incorporated cities, villages and towns, approved and in force March 27, 1889," city councils in cities, the president and board of trustees in villages, or the board of trustees in incorporated towns, whether incorporated under general law or special charter, were given the power to designate, by ordinance, the whole or any part of, not to exceed two streets, roads, avenues, boulevards or highways, under their jurisdiction, as a public driveway, "to be used for pleasure driving only, and to improve and maintain the same, and also to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve and maintain not more than two roads, streets or avenues, and designate the same as pleasure driveways to be used for pleasure driving only; PROVIDED, said powers shall only be exercised when said corporate authorities are petitioned thereto by the owners of more than two-thirds of the frontage of land fronting upon said proposed pleasure driveway."

Section 3 of this act reads as follows:

"Said corporate authorities may, by ordinance, regulate, restrain and control the speed of travel upon such pleasure drives and prescribe the kind of vehicles that shall be allowed upon the same, and in all things may regulate, restrain and control the use of such pleasure driveway by the public or individuals, and may exclude therefrom funeral processions, hearses and traffic teams and vehicles so as to free the same from any and all business traffic or objectionable travel and make the same a pleasure driveway for pleasure driving only, and may prescribe in such ordinance such fines or penalties for

the violation thereof as they are allowed by law to prescribe for the violation of other ordinances.”

On the 24th day of May, 1889, the president and board of trustees of the Village of Hyde Park adopted an ordinance designating Washington avenue from Lake avenue to Midway Plaisance for pleasure driving, which ordinance was engrossed the 23d day of May, 1889, in Book 6, page 70, of the Ordinances of Hyde Park. I quote this ordinance verbatim :

“BE IT ORDAINED BY THE PRESIDENT AND BOARD
OF TRUSTEES OF THE VILLAGE OF
HYDE PARK :

“Section 1. That the whole of Washington avenue in the village of Hyde Park from its junction with Lake avenue on the north, to the Midway Plaisance, or Fifty-ninth street, on the south, be, and the same is hereby, designated as a public driveway to be used for pleasure driving only.

“Sec. 2. All pleasure driving upon said Washington avenue shall not exceed the rate of eight miles an hour on any part of said avenue, and all funeral processions, hearses and traffic teams and vehicles are hereby excluded from such Washington avenue; and the same shall be kept free from any and all business traffic or objectionable travel, in order that said avenue may be reserved for a pleasure driveway for pleasure driving only; provided, however, that grocery wagons, coal wagons, delivery wagons and express wagons when engaged in delivering groceries, coal or express packages, baggage or other supplies for the use of inhabitants residing on said avenue, and building materials for use in erection of buildings on said avenue, shall be permitted to be and travel upon said avenue for a distance not exceeding two blocks thereon in any continuous trip, it being the intent and meaning of this ordinance that no traffic teams and vehicles shall be or travel upon said avenue except for so long a time as may be necessary for the purpose of delivering to the people residing on said avenue household and other supplies, building material, etc.

“Sec. 3. Any person who shall violate any of the pro-

visions of this ordinance shall, upon conviction, be subjected to a fine not exceeding \$100.00 for each offense.”

As I view it, there exists no misapprehension as to the interpretation to be placed upon that paragraph of the annexation act which deals with ordinances in force in the annexed territory prior to annexation.

People v. Cregier, 138 Ill., 401.

The statute relating to the establishment of Pleasure Drives provides that, as a condition precedent, it is necessary that the proper authorities be petitioned by the owners of more than two-thirds of the frontage upon said proposed pleasure driveway. This, it is to be assumed, was done in the case under consideration, and upon the adoption of the proper ordinance by Hyde Park the street became impressed with the particular burden or easement of a pleasure driveway. This status was not changed when the territory within which it lies was annexed to the City of Chicago, but it came into and became a part of the city impressed with that burden. The right of the original petitioners and their assigns to have this become, hence to remain, a pleasure driveway, is one expressly conferred by the statute itself. The mere fact that it, in common with other territory belonging to Hyde Park, was annexed to the City of Chicago, would not operate to denude the street of its particular character, nor to deprive the petitioners of the privilege conferred by the statute. The acceptance of the petition by the proper authorities of Hyde Park, and their action thereon, obviates the necessity of any similar action by the city. By virtue of the act of annexation, the street became a street of the City of Chicago of the same kind and character as it had been of Hyde Park.

City of Chicago v. Larned, 203 Ill., 290.

The City of Chicago has no ordinance relating to pleasure driveways. It has been the policy of the city to turn over to the various park boards those streets that are maintained as boulevards, and the city has no known or fixed policy with reference to these pleasure driveways. But the particular street now under consideration came into the city as a pleasure driveway, and, in my opinion, still retains that status. The duty and obligation, in my opinion, devolve upon the city

to see to it that its use is limited to that of a pleasure driveway.

To summarize: I am of the opinion that Washington avenue from Forty-ninth street, south, is a pleasure driveway; that the city has full and complete jurisdiction over it; that the police of the City of Chicago have authority to enforce the limitation of its use to that of a pleasure driveway; that persons arrested for violating the limitation of its use, should be booked under the former Hyde Park ordinance.

Yours very truly,

GEO. M. BAGBY,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

SEPTEMBER 15, 1908.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

Replying to your favor of September 11, 1908, requesting an opinion as to whether you are justified in requiring importers of smoked, salt and pickled fish who do a strictly wholesale trade in original packages to take out a fishmonger's license, will say, there is no doubt about the right of the city to license and regulate by proper ordinances this kind of business within its corporate limits. Such right, however, can not be extended to, nor can it in any manner control or impede, commerce between the States or with foreign nations.

So long as goods imported into one of the United States from a foreign country or from a foreign State into this State remain in the original unbroken package, the importer may sell the same in that form without first taking out a license from the State or municipal authorities.

A State law requiring him to first take out a license would be in conflict with the Constitution of the United States.

State v. Shapleigh, 27 Mo., 344.

Shollenberger v. Penn., 171 U. S., 1, 7 Cyc., 430.

The power of Congress over the entire subject of interstate and foreign commerce is supreme and exclusive and

in so far as such commerce is concerned, State and municipal laws are inoperative.

In re Minor, 69 Fed., 233.

It appears from the letter accompanying your request that that firm is in the business of selling exclusively to wholesale trade in original unbroken packages goods received by them from foreign States and Europe.

I am of the opinion that the ordinance regulating fish-mongers, Section 1408, R. M. C., 1905, does not apply to merchants conducting that business in the manner above indicated.

Yours very truly,

JOHN J. BEILMAN,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 16, 1908.

HON. FRED A. BUSSE, Mayor.

Dear Sir:

In reply to the communication of John Carlberg, referred by you to this department, in which he complains regarding the maintenance of a beer distributing depot at the southwest corner of Balmoral avenue and West Ravenswood park, which is owned by the Standard Brewery of Chicago, permit me to say:

These premises are within the prohibition district described in Section 2 of an ordinance of Lake View passed June 27, 1889, and approved July 1, 1889 (Revised Municipal Code of Chicago of 1905, page 756). The boundaries of the prohibition district are not accurately described in the letter of Mr. Carlberg, but since said depot is clearly within the boundaries as described in the ordinance there is no need of stating them at length.

Section 1 of said ordinance reads as follows:

“Section 1. Within the territory designated in Section 2 of this ordinance, no license shall at any time hereafter be granted to any person or persons to keep a saloon, dramshop,

or other place, for the sale, exchange, giving away or barter of any kind of alcoholic drinks.”

Upon the annexation of the City of Lake View to the City of Chicago this ordinance continued in full force and effect by virtue of Section 18 of an act entitled, “An act to provide for the annexation of cities, incorporated towns and villages, or parts of same, to cities, incorporated towns and villages, approved and in force April 25, 1889.

Hurd’s Rev. Stat. of 1906, page 333.

A dramshop is defined in Section 2 of the Dramshop Act (Hurd’s Rev. Stat. 1906, page 838) as follows:

“That a dramshop is a place where spirituous or vinous malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.”

The prohibition contained in Section 1 of the ordinance of the City of Lake View, quoted *supra*, relates to the keeping of a saloon, dramshop or other place for the sale, exchange, giving away or barter of any kind of alcoholic drinks. Under the ordinary rules of construction, the words “to keep a saloon, dramshop or other place” must be construed to mean “to keep a saloon, dramshop or other *similar* place.” The prohibition, therefore, relates only to such places where alcoholic liquors are disposed of in small quantities, namely, by the drink, or in quantities less than one gallon.

This ordinance consequently does not prohibit the establishment and maintenance of a beer distributing depot, when no drinks are sold or given away on the premises, nor does it prohibit the maintenance of a place where liquors are sold exclusively in quantities of one gallon or more, because such places can not be regarded as dramshops.

I return herewith letter of Mr. Carlberg and copy of letter addressed to him.

Yours very truly,

GEORGE E. DIERSSEN,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

SEPTEMBER 17, 1908.

C. A. McCULLOCH, Esq., House of Correction Inspector.

Dear Sir:

Statutory provision has been made for the municipal authorities of any city within this State to establish a House of Correction.

Chapter 67, Par. 1, S. & C. Ann. Ill. Statutes, page 2112.

The title of this act is: "House of Correction," and its second paragraph is sub-titled: "Inspectors — Appointment, etc.," and, so far as it is material to the main question before us, reads as follows:

"The management and direction of any House of Correction already established or which may hereafter be established in any such city, shall be under the control and authority of a Board of Inspectors, to be appointed for that purpose, as in this section directed. The Mayor of said city shall, by virtue of his office, be a member of said board, who, together with three persons to be appointed by the Mayor, by and with the advice and consent of the legislative authority of said city, shall constitute the said Board of Inspectors."

By this paragraph you will observe that the power and authority vested in the Board of Directors is that of the "management and direction of any House of Correction." These terms, "management" and "direction," are practically, legally and in every essential respect, synonymous. It has been said "management means administration, control, etc., and one of the synonyms of management is 'government,' which means control; so that under the power to provide for the management of slaughter houses a city has power to prohibit the operation of slaughter houses within the city."

City of St. Louis v. Howard, 24 S. W., 770-771; 119 Mo., 41; 41 A. St. Rep., 630.

Again, in judicially defining the word "direction," it has been held "A devise providing that the executors shall have control and *direction* over a son meant that they should have the power of guardianship over the son."

Rock River Paper Co. v. Fisk, 10 N. W., 244-6; 47 Mich., 212.

And our own Supreme Court, interpreting the same word,

uses this language: "The word 'direction,' as used in a contract by which a contractor agreed to build a sewer under the immediate *direction* and superintendence of the Commissioner of Public Works, related to the results, and not to the methods to be employed, and did not, therefore, make the contractor a servant of the city, as being one who, though he is to have a stipulated price for a thing, executes it under the direction and superintendence of the employer.

Foster v. City of Chicago, 64 N. E., 322-3; 197 Ill., 264.

It is quite clear to my mind that the power and authority thus given the Board of Directors is confined exclusively to the administration of the government of the House of Correction. This conclusion is borne out by Paragraph 3 of Section 3 of the statute, which reads follows:

"That whenever a Board of Inspectors have been organized as in Section second of this act directed, they shall have power and authority to establish and adopt rules for the regulation and discipline of the said House of Correction, for which they have respectively been appointed, and, upon the nomination of the superintendent thereof, to appoint the subordinate officers, guards and employees thereof; to fix their compensation and prescribe their duties generally; to make all such by-laws and ordinances *in relation to the management and government thereof*, as they shall deem expedient. No appropriation of money shall be made by the said Board of Inspectors for *any purpose* other than the ordinary and necessary expenses and *repairs* of said institution, except with the sanction of the legislative authority of said city."

The limitation of their power and authority is further set forth in Section 4 of Paragraph 4 of the statute, which defines, among other things, the Inspector's duties, and such part as is pertinent reads as follows:

"There shall be a meeting of the entire Board, at the House of Correction, *once in every three months, when they shall fully examine into its management in every department*, hear and determine all complaints or questions not within the province of the superintendent to determine, and make such further rules and regulations for the good government of said House of Correction as to them shall seem proper and neces-

sary. One of said appointed Inspectors shall visit the said House of Correction once, at least, in each month. All rules, regulations or other orders of said Board shall be recorded in a book to be kept for that purpose, which shall be deemed a public record, and, with the other books and records of said House of Correction, shall be at all times subject to the examination of any member or committee of the legislative authority, the comptroller, treasurer, corporation counsel, or attorney of any such city."

Section 13, Paragraph 13 of the act, sub-title "*Expenses*" provides as follows:

"The expenses of maintaining any such House of Correction over and above all receipts for the labor of persons confined therein, and such sums of money as may be received from time to time by virtue of an agreement with the county, as in this act contemplated, shall be audited and paid from time to time, by the legislative authority of such city, and shall be raised, levied and collected as the ordinary expenses of said city."

By virtue of the authority vested in it by this statute, the Common Council of the City of Chicago has enacted an ordinance entitled "House of Correction," which constitutes Chapter XXIII of the Revised Municipal Code of Chicago of 1905. The first paragraph of this ordinance constitutes Paragraph 1307 of said Code, and reads as follows:

"The buildings and inclosures erected and now standing, or that may hereafter be erected on that part of the east one-half of the southwest one-quarter of Section twenty-five, Township thirty-nine North, Range thirteen, East of the third principal meridian, lying north of the west branch of the south branch of the Chicago river, being between Twenty-sixth street and the west branch of the south branch of the Chicago river, situate and lying within the City of Chicago, are constituted and established a House of Correction for the said city; *and any buildings and inclosures that may hereafter be erected on any lot or lands purchased, owned or leased by the city for the purpose of a House of Correction, whether within or without the limits of said city shall be subject to the conditions and provisions of this chapter.*"

Section 10 of this ordinance, which constitutes Paragraph 1316 of the Code, provides as follows:

“The Board of Inspectors shall have the right to make all proper rules and regulations for the purpose of carrying out the provisions of this chapter.”

This constitutes the entire power and authority of the Board of Directors, so far as they have been defined by the Common Council of the City of Chicago. I believe this to be a strict compliance with both the letter and spirit of the legislative enactment, and that both taken together very clearly show that the intention of the Legislature of the State in creating this board was simply to provide for a managing body of the institution, while the city's ordinance is simply complementary of that intention.

It is provided in Paragraph 39, Article 1, page 10, Revised Municipal Code of 1905, as follows:

“All contracts for work, material, or supplies *of any kind or nature* let by *any officer* of the city, where the amount of such contract exceeds five hundred dollars, shall be let to the lowest responsible bidder after advertising the same. *All such contracts before becoming of any effect shall be approved and countersigned by the City Comptroller.*

“Advertisement shall be made and bids submitted and received by the proper officer, in the same manner as is provided for the letting of contracts in and by the provisions of Article I of Chapter LII of this ordinance concerning the letting of contracts by the department of public works.”

Our Supreme Court has, in very clear terms, interpreted the above paragraph, and has held that, where an original contractor had failed to complete the work under his contract, and the uncompleted work exceeded in value the sum of five hundred dollars, it was necessary to advertise and receive bids the same as in the original contract.

I assume that the contemplated building at the House of Correction will cost in excess of five hundred dollars, and if so, I am of the opinion that if the proper advertisement has already been made, and the bids in, the Commissioner of Public Works is the proper one to open these bids, and that

any contract would have to be approved and countersigned by the Comptroller.

Paragraph 1847 of the Code reads as follows:

“All contracts for the making of any public improvement or for any work or other public improvement, when the expense thereof shall exceed the sum of five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same, and shall be approved by the Mayor; but any such contract may be entered into by the said Commissioner without advertising for bids, and without such approval, by a vote of two-thirds of all the aldermen elected. No contract shall be made for any work or supplies relating to any of the matters within the cognizance of the Department of Public Works, unless such work or supplies shall have been authorized by the City Council.”

Paragraph 1849 of the Code provides how contracts shall be let, and reads as follows:

“All contracts exceeding in amount the sum of five hundred dollars for work, materials or supplies, relating to any of the matters under the cognizance of the Department of Public Works, shall be let by the Commissioner of Public Works to the lowest reliable and responsible bidder or bidders, whose bid does not exceed the estimate; and bonds, to be approved by the Commissioner, shall be taken for the faithful performance thereof; all such contracts shall be executed in triplicate, by the Commissioner of Public Works, on the part of the city, and by the contractor; one original copy so executed shall be kept and filed in the office of the Commissioner of Public Works; one shall be filed in the office of the Comptroller, and the third shall be given to the contractor. All contracts and bonds so taken shall be in the name of, and run to, the City of Chicago; and every contract for a sum greater than five hundred dollars shall have the consent, in writing, of the Mayor endorsed thereon, and shall be countersigned by the City Comptroller.”

Paragraph 1850 of the Code provides, among other things, as follows: .

“In all contracts executed by said Commissioner on

behalf of the city, the right shall be reserved to said Commissioner to finally decide all questions arising as to the proper performance of the work," etc.

Paragraph 1841, Chapter LII, Article 1, page 487, entitled "Public Works," of the Revised Municipal Code of 1905, defines the power of the Commissioner of Public Works, and reads as follows:

"Said Commissioner shall have charge of all public improvements commenced, or to be commenced, by said city, and shall have power, subject to the ordinances of the city, to regulate and control the manner of using the streets, alleys, highways"

and contains a proviso that nothing therein contained shall be construed as relating to the construction of local improvements paid for in whole or in part by special assessment. The erection of the building under consideration, I assume, is not within this proviso.

Paragraph 1842 defines the duties of the Commissioner of Public Works and seems to me to fully answer the first question here propounded. It reads as follows:

"It shall be the duty of said Commissioner of Public Works, subject to the provisions hereof and the ordinances of the city, to take special charge and superintendence of all streets, etc., in the city; of all market and market places and all *other public buildings* in the city, belonging to the city, and of *the erection of all public buildings*, etc."

There can be no question that the contemplated building is a public building, and if so, under this council authorization and direction it is the duty of the Commissioner of Public Works to open bids and let the contract for the erection of the building in question.

I am of the opinion that the Board of Directors of the House of Correction has no authority to open the bids and let the contract for the erection of the contemplated building; that its power and authority are limited to the government, management and control of the House of Correction, as an institution, and if this conclusion be correct, it necessarily

follows that it would have no power to employ an outside engineer to supervise the erection of this building.

Yours very truly,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 19, 1908.

W. J. McCourt, Esq., Superintendent of Water.

Dear Sir:

I learn from your communication of the 10th instant, wherein you ask to be advised whether or not, under ordinance, you have the right to cut off the supply of water from the premises of Dehl Brothers, 141-143 Ontario street, for refusing to pay the bill rendered, that the bill presented by you is founded upon the assumption that the registry of the untampered-with meter, showing the correct amount of water used and actually registered from June 15 to July 21, furnished an unquestionable accurate and reliable basis on which to compute the water used on the premises from April 29, 1905, to May 23, 1908.

I observe that during the last mentioned period Dehl Brothers promptly paid such bills as your department presented to them, and infer, that they now refuse to pay the sum of \$3,892.09 for the reason that they question it.

The City of Chicago supplies its inhabitants with water in its capacity of a private corporation and not in the exercise of its powers of local sovereignty. This power is granted it as a special private franchise, and is made as well for the private emolument and advantage of the city as for the public good. Therefore, as to such a matter, it stands upon precisely the same footing as would an individual, or any body of persons, enjoying like special franchise.

Wagner v. Rock Island, 146 Ill., 139.

Bruun's App. (Pa.) 12 Atl. Rep., 855.

Western Saving Fund Soc. v. Philadelphia, 31 Pa., 175;
77 Amer. Dec., 130.

Bailey v. New York, 3 Hill., 521; 38 Amer. Dec., 669.

Water rates are not taxes, but merely compensation paid by those who choose to receive and use the water. It is the price of the commodity furnished.

Wagner v. Rock Island, 146 Ill., 139.

The ordinances, rules and regulations governing and affecting your department are required to be reasonable and just, and they are a part of all agreements between the Water Department and those to whom it furnishes water. No doubt the agreement or contract between Dehl Brothers and the city provides, in terms, for the payment of a fixed sum for a stipulated amount, which furnishes the basis upon and from which all bills for water are computed. By reason of changed circumstances, your department is unable to furnish them a bill of this character, and they, I assume, refuse to pay the bill presented which was computed from a different standard. If Dehl Brothers are without fault they are, in my opinion, clearly within their rights in declining payment of the bill rendered. First, there may be an honestly disputed fact as to the meter having been tampered with; second, they may honestly question owing the department anything for the period named; third, they would have the right to require proof that your method of computing was fair, just and reasonable under the circumstances.

The law has not constituted the Water Department a judicial tribunal to pass upon the merits of its own demands and enter judgment in its own favor without hearing or trial. The adjudication of all such disputes belongs to the courts.

State v. Nebraska Tel. Co., 17 Neb., 126.

Shepard v. Milwaukee Gas Light Co., 6 Wis., 539.

I am of the opinion that you have no right under the ordinance or under the law to shut off the water under the

circumstances, and that the proper method of asserting your claim is to institute suit upon it in the court.

Yours very truly,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

SEPTEMBER 23, 1908.

E. J. MAGERSTADT, Esq., City Collector.

Dear Sir:

Replying to your favor of September 21, 1908, requesting an opinion on the right of a milk dealer to sell milk from his wagon on the street in front of the R. T. Crane Manual Training School, he having taken out a milk wagon license; also what his status would be if such sales were made in a vacant lot, will say: I note from the letter accompanying your request that Sitt Brothers Dairy Company is supplying milk to the Training School restaurant and on account of the inadequate accommodations all the students are unable to have their wants supplied there and they (the students) have requested them to sell milk from their wagons on the street in front of the school; that it takes about forty minutes to supply the students and in so doing traffic is not interfered with or any disturbance created, and that the police have threatened to arrest the drivers.

Sections 1123 and 1124 of the Revised Municipal Code of 1905 provide:

“1123. . . . Every person or corporation selling or disposing of milk or cream shall annually, on the first day of May, pay license fees as follows: Every milk or cream vendor selling . . . milk and cream, or either of them, in and from any store, stand, booth, market place, milk depot, warehouse, dairy, cow stable, or any building or establishment of any kind, or in or from any wagon, carriage, or other vehicle, shall pay the sum of ten dollars. When more than

one wagon, carriage or vehicle is used from which milk or cream is sold or offered for sale . . . for each such additional wagon . . . the sum of ten dollars.”

“1124. . . . No license issued hereunder shall entitle or authorize the licensee named therein to carry on, engage in, or conduct the business of vendor of milk in any place or places other than that described and set out in such license; and a separate license fee shall be paid for each and every place at which such business is carried on,”

The right to sell milk in or from a wagon by persons having a license is clearly granted by Section 1123. Such right, however, does not authorize the licensee to establish a stand or locate his wagon at a certain place upon the public highway and there conduct or carry on his business. The right to establish such a stand upon any of the streets is prohibited by Section 1924 of the Revised Municipal Code of 1905, which provides:

“It shall be unlawful for any person or corporation to erect, place or maintain in or upon any street, alley, sidewalk, or other public place in the city any fruit stand, lunch stand, lunch wagon, flower stand, bulletin board, trough for feeding horses, or any table, box, bin, rack, showcase, platform, or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever.”

The real question to be determined is whether the person having a license to sell milk from a wagon violates Section 1924 by stopping at a certain place for the period of about forty minutes to supply the wants of his customers. The ordinance in question governs dealers in milk and cream having permanent places from which their business is carried on and those selling from wagons to any person who may choose to buy from them. The latter class of dealers in milk and cream have been termed “peddlers” by our Supreme Court.

City of Chicago v. Bartee, 100 Ill., 57.

The license issued to the dairy company to sell milk from their wagons (assuming they have a license for each

wagon) authorizes them to conduct their business in the same manner as other peddlers licensed to peddle from wagons.

I do not think it can be said that a peddler would violate Section 1924 if it required forty minutes or one hour to supply his customers at any particular place.

I am, therefore, of the opinion that any person having a license as a milk vendor or a license as wagon peddler may lawfully sell his goods from his wagon and may occupy the streets at a particular point where his customers may be found for such reasonable time as it would require him to supply their wants, and in this case forty minutes would not be an unreasonable time unless traffic was impeded thereby or the manner of conducting the business or the result thereof became a nuisance.

Regarding the second question, Section 1124, above quoted, provides that a separate license fee shall be paid for each place at which such business is conducted; therefore, if the dairy company wish to place a stand in a vacant lot for the purpose of selling milk, even though the wagon constitutes such stand, a separate license shall be required and such place will be subject to all the provisions of the ordinances relating to the sale of milk and cream.

Yours very truly,

JOHN J. BEILMAN,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 25, 1908.

CHARLES M. THOMSON, Esq., Alderman, Twenty-fifth Ward.

Dear Sir:

Your favor of the 22d inst. received, in regard to the refusal of the Commissioner of Buildings to approve plans of an architect whose license has been revoked by the State Board of Examiners of Architects, and, in reply, I beg leave to state that Section 11, Chapter 10A, Revised Statutes of Illinois, in force since July 1, 1907, provides:

“Every licensed architect in this State who desires to conduct the practice of his profession shall, annually, during the time he shall continue such practice, pay to the secretary of the board during the month of July a fee of five dollars, and the secretary shall thereupon issue to such licensed architect, a certificate of renewal of his license for the term of one year. Any licensed architect who shall fail to have his license renewed during the month of July in each and every year shall have his license revoked. . . .”

Said section further provides for the renewal of licenses on a payment of ten dollars.

By this section of our State law, you will see that if this license fee is not paid during the month of July of each year the license is revoked by the said Board of Examiners of Architects and the architect ceases to be a licensed architect. The other class of architect whose license is occasionally revoked are for reasons which go to the merits of the architect, such as you have called “malpractice.”

In the latter class, I am of the opinion that the Building Commissioner should not refuse to approve the plans of the architect pending charges against him which have not yet been acted upon, and where the license has not been revoked by formal act of said Board of Examiners of Architects.

The provisions of Chapter 10A, Revised Statutes of Illinois, relative to architects and the State Board of Examiners of Architects, have not been declared invalid by any decision of our Supreme Court, and while the provisions of Section 10 of said Chapter 10A confer some arbitrary powers upon said Board of Examiners relative to revocation of licenses and does not provide for a review of their actions by any court of competent jurisdiction, still I am of the opinion that the Building Commissioner of the City of Chicago should consider this section of our State law as operative, and in accordance therewith should recognize the actions of said Board relative to the revocation of licenses of architects as binding until said section has been declared unconstitutional and void, if it is ever so declared.

Assuming, then, that the State law relative to the State Board of Examiners of Architects is valid, I desire to direct

your attention to the provisions of our city ordinances relative to licensed architects and the approval of plans by the Commissioner of Buildings.

Section 229, Revised Municipal Code of Chicago of 1905, as amended February 26, 1906, provides that before proceeding with the construction, enlargement, alteration, repair or removal of any building in the city a permit shall first be obtained by the owner or his agent from the Commissioner of Buildings.

Section 230, Revised Municipal Code of Chicago of 1905, as amended, Council Proceedings February 26, 1906, page 2775, provides that:

“In all cases where a licensed architect shall have completed, signed and affixed his seal to the plans, drawings or specifications for any building designed to be erected within the corporate limits . . . the architect making such plans, drawings or specifications shall submit the same to the Commissioner of Buildings for his approval. . . .”

Section 232, after specifying the requirements of drawings, plans and specifications, provides that:

“No permit shall be granted or plans approved unless such plans shall be signed and sealed by a licensed architect, as provided in ‘An act to provide for the licensing of architects and regulating the practice of architecture as a profession in the State of Illinois,’ approved June 3, 1897.”

This said Act of June 3, 1897, being the same as is hereinbefore referred to as Chapter 10A, Revised Statutes of Illinois, and said ordinance by direct reference to the State law and drawn in conformity therewith makes the requirement that an architect should be licensed a prerequisite to the approval of the plans presented by said architect.

In view of the provisions of our State law and city ordinances, I am of the opinion that the Commissioner of Buildings may lawfully refuse to approve plans submitted by an architect who is not at the time of submitting said plans a licensed architect. This is subject, however, to the last proviso in said Section 232, Revised Municipal Code of Chicago of 1905, relative to Class III building, which is as follows:

“Provided, that permits may be granted for the erection of buildings of Class III, as hereinafter defined, if such buildings shall not be more than two stories in height and shall have a superficial area of not more than twelve hundred and fifty square feet outside dimensions, on plans approved by the Commissioner of Buildings, which plans need not be signed by a licensed architect.”

Answering specifically your further question, “Is, or is not, an architect who has been suspended for nonpayment of fees due the Board of Examining Architects a licensed architect within the meaning of the language of the building ordinance?” In my opinion, he is not.

Yours truly,

WILLIAM S. STAHL,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 25, 1908.

ARTHUR B. MCCOY, Esq., Alderman Sixth Ward.

Dear Sir:

I have been directed to reply to your communication of the 19th instant, addressed to the Corporation Counsel, calling attention to the bill boards which have been erected and are being maintained at various points along the right of way of the Illinois Central Railroad upon land lying between the tracks of said company and the shore line of Lake Michigan, for which no compensation is paid the city, and some of which contain advertisements of an objectionable character; also, that numerous citizens consider them a nuisance and desire their removal.

Relative to the erection of bill boards upon land abutting the right of way of a railroad, permit me to direct your attention to Section 709 of the Revised Municipal Code of Chicago

of 1905, as amended January 2, 1907 (Council Proceedings, page 2486), which provides as follows:

“No bill board or sign board, such as is described in this article, shall be erected or maintained within the city unless a permit shall first have been secured by the person desiring to erect or maintain such bill board or sign board from the Commissioner of Buildings, to whom application for such permit shall be made; and such application shall be accompanied by such plans and specifications of the proposed bill board or sign board as are necessary to fully advise and acquaint the said Commissioner with the construction of such proposed bill board or sign board. If the plans and specifications accompanying such application shall be in accordance with the provisions of this article, said Commissioner shall thereupon issue a permit for the erection of such bill board or sign board upon the payment by the applicant of a fee as hereinafter fixed; *provided, however, that none of the provisions of this article shall apply to or affect any bill board erected upon land abutting the right of way of any railroad where such bill board does not come within twenty-five feet of any public highway and where the bottom of such bill board is not less than three feet from the ground and the same is situated more than fifty feet from any building.*”

It is clear that the City Council did not intend that the regulative features contained in Article XXIII of the building ordinances in regard to bill boards and sign boards should apply to such as are erected on land abutting the right of way of any railroad. The only conditions required are that such bill boards shall not be placed within twenty-five feet of a public highway, or within fifty feet of any building, and that the bottom of such bill board shall be at least three feet above the ground. If such bill boards comply with these provisions no permits or fees are required. Under ordinary conditions, therefore, the only persons who could object to the maintenance of such bill boards are the owners of the land upon which they are placed, if placed without their consent. The City Council, having authorized their erection, can not cause their removal unless they violate the provisions of Section 709, or are placed upon city property without the consent of the

proper municipal authorities. The Charter of the City of Chicago contains no express power to the City Council to regulate or prohibit bill boards, and the City Council, therefore, can not prohibit their erection, but can only make reasonable regulations concerning them by virtue of its police power.

A bill board is not a nuisance *per se*; the mere fact that it is unsightly, mars the beauty of the city, or shuts off a view of the lake, as stated in your communication, is not sufficient to constitute it a nuisance; it must be further shown that it is a menace or danger to the health, life, morals or property of the community.

The case of the City of Chicago v. The Gunning System, 214 Ill., 628, is an instructive case in this connection. It appears therein that the City Council passed an ordinance containing very stringent provisions regarding the erection of bill boards, the validity of which was contested by the Gunning System. On page 642 of the opinion the court uses the following language:

“The purpose of Sections 4 and 5 seems to be mainly sentimental, and to prevent sights which may be offensive to the esthetic sensibilities of certain individuals residing in or passing through the vicinity of the bill boards. The extreme restrictions placed on the erection and maintenance of such boards, and the license fee placed thereon, indicate that these sections were intended to be prohibitive rather than regulative, and are, in our judgment, unreasonable.”

Regarding the character of the advertisements appearing on some of the bill boards in question, I beg to say that, if they are offensive, obscene or indecent, and have a tendency to deprave and corrupt the morals of those whose minds are open to such influences, such advertisements may be prohibited as common-law nuisances.

Yours very truly,

GEORGE E. DIERSSEN,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

SEPTEMBER 26, 1908.

WALTER J. RAYMER, Esq., Commissioner of Track Elevation.

Dear Sir:

In reply to your communication of recent date, addressed to the Corporation Counsel, requesting any opinion as to whether certain railroad companies therein mentioned can prolong the completion of the elevation of their tracks beyond December 31, 1908, as required under ordinance of September 29, 1902, and amendment of December 9, 1907, without an extension ordinance, I submit the following:

Section 14 of said ordinance provides:

“The railway and railroad companies mentioned in this ordinance, who are required to elevate their roadbed and tracks, shall fully and finally complete the work of elevation on or before the 31st day of December, 1907, unless prevented by strikes or riots or restrained by injunction or other order or process of a court of competent jurisdiction. The time during which said railway and railroad companies shall be prevented by strike or strikes, riot or riots, or legal proceedings as aforesaid, shall be added to the time hereby limited for the completion of said work. . . .”

Aside from above provisions the failure of the company to finish the work within the time limited does not put them in default where their failure is caused by the service of an injunction restraining both the city and the companies from proceeding under the contract.

Webb Granite & C. Co. v. City of Worcester, 73 N. E., 639.

I find that the injunction proceedings in case *Manhattan Trust Co. v. Chicago Electric Traction Co.* were instituted June 26, 1907, and terminated May 12, 1908, by order of court decreeing that the headway at Seventy-first street at a point between State street and Cottage Grove avenue should be raised so as to leave a headroom of thirteen feet and six inches, in the clear.

The injunction proceedings in case *Potter v. Farson* were instituted August 14, 1907, and terminated May 12, 1908, by order of court decreeing that the headway at Cottage Grove avenue between Seventy-first and Seventy-second streets

should be raised so as to leave a headroom of thirteen feet and six inches, in the clear; also providing that headway at Stony Island avenue at or near Seventy-ninth street should be raised so as to leave a headroom of thirteen feet and six inches; also providing that headway at Seventy-fifth street subway be raised so as to leave a headroom of thirteen feet and six inches.

In the mandamus case of *Hochstetter v. City, et al.*, described as *Lutz v. City, et al.*, proceedings were instituted March 25, 1907, and a general demurrer was sustained April 18, 1908, from which no appeal was taken. These proceedings are ended for all practical purposes. This proceeding affected Jackson Park avenue, formerly known as Stony Island avenue, 330 feet south of the intersection of said Jackson Park avenue with Seventy-ninth street, and the abutments out, into and on said Jackson Park avenue, 50 feet on either side of the center line of said Jackson Park avenue, and Seventy-ninth street at the crossing of Seventy-ninth street, 203 feet west of the center line of Jackson Park avenue.

I am, therefore, of the opinion that the railroad companies mentioned in said ordinance should be allowed to add the period of time between the commencement and termination of said proceedings to the time named in said original ordinance, without another extension ordinance. I am, further, of the opinion that this saving clause applies only to the localities mentioned in said proceedings. It will be noted that the time for completion of the road at the places mentioned in the cases of *Manhattan Trust Co. v. Chicago Electric Traction Co.* and *Potter v. Farson* will have expired December 31, 1908. I am also of opinion that you may notify the companies that the work must be finished by December 31, A. D. 1908.

Yours very truly,

ALBERT W. MAY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

SEPTEMBER 30, 1908.

GEORGE M. SHIPPY, ESQ., Superintendent of Police.

Dear Sir:

In your communication to the Corporation Counsel, you request an opinion, *First*, as to how long an owner of vehicles for hire having an office or place of business may allow his vehicles to stand in front of such office or place of business; *second*, whether the same privilege can be enjoyed by other owners of vehicles or must such vehicles stand at the places designated in the ordinance as public cab stands.

In the absence of an ordinance it would not be illegal to stand a vehicle on a public highway unless it unreasonably interfered with travel.

State v. Edens, 85 N. C., 522.

Chapter 24, Art. V, Sec. 1 of the Cities and Villages Act empowers cities to regulate the use of streets. Under such power an ordinance prohibiting the owners of public vehicles from standing same on a street, excepting at designated places, has been upheld.

Commonwealth v. Matthews, 122 Mass., 60.

Branahan v. Hotel Co., 39 Ohio St., 333.

The owner of lots, however, abutting upon a public street in a city has a peculiar interest distinct from the right of the general public.

Rigney v. City, 102 Ill., 64.

He may use the highway for such personal use as will not be inconsistent with, destroy or impair its use as a public street.

McCaffrey v. Smith, 41 Hun. (N. Y.), 117.

Branahan v. Hotel Co., 39 Ohio St., 333.

In recognition of the rights of abutting owners, the ordinance provides, "that nothing herein contained shall be construed so as to prevent any vehicle herein referred to from standing for a reasonable length of time for the purpose of receiving and discharging passengers in front of the office or place of business of the person, firm or corporation owning such vehicle."

The above provision is but a reiteration of the general law and does not amount to an illegal discrimination.

First.—I am, therefore, of the opinion that public vehicles may stand for a reasonable length of time in front of the office or place of business of the owner of same. It must not amount to an obstruction of public travel or impair the enjoyment of the street as a public highway. The manner of regulating same necessarily depends upon the locality, its accustomed usage and the exigencies of the public.

Second.—All other public vehicles must stand at the places designated in the ordinance when not engaged in receiving or discharging passengers.

Yours very truly,

ALBERT W. MAY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

OCTOBER 1, 1908.

JOSEPH Z. UHLIR, Esq., Alderman, Twelfth Ward.

Dear Sir:

Some time ago this department, at your request, drafted an ordinance vacating the north and south public alley in Sub-block 1 of Block 10 in the division of Section 19-39-14, and also a part of West Fourteenth street immediately south of and adjoining said Sub-block 1. Subsequently John D. Riley, Superintendent of Maps, suggested that the rights of the Chicago Terminal Transfer Railroad, occupying a portion of the above mentioned street, be investigated and determined before the acceptance of the ordinance. This matter was referred to me by the Corporation Counsel for opinion.

The records disclose the fact that in 1853 proceedings were had in the City Council by which Section 19-39-14 was subdivided into lots, blocks, streets and alleys, the streets being sixty-six feet wide, and that, among others, was the one now known as West Fourteenth street; that at the time of this plat and subdivision the City of Chicago was operating under special charter granted by the Legislature March 4, 1837, which provided:

“The Common Council shall have power to lay out, make

and assess streets, alleys, lanes and highways in said city and make wharves and slips at the ends of streets, and to alter, widen, construct, straighten and discontinue the same."

"Whenever the Common Council shall desire to take or appropriate any land or town lot, or any part thereof, not the property of the city for any of the purposes aforesaid, they shall cause an application to be made in writing to some court of record in the County of Cook or judge thereof, in vacation, for the condemnation of such land or town lot, or part thereof, for such purposes, and give notice of such application by publishing a notice thereof for thirty days in the corporation newspaper."

Provision is also made for formal court proceedings in the matter of condemning property for the use of streets.

It appears that all action in connection with the platting of said subdivision took place in the City Council and that no court proceedings were had, as required by said charter. It is claimed by the Terminal Company that if court proceedings had been instituted the fee simple title to the street would have vested in the city for the use of the public, but in the absence of such proceedings only an easement was acquired, and that if the land has never been used as a street, or has been abandoned, the easement or right to use the street would be lost and the fee simple title would remain in the original proprietor or his grantee.

At the time of the original subdividing of Section 19 by the city, West Fourteenth street was platted as William street, and, upon investigation, I find that on March 16, 1868, the City Council changed the name of William to Mitchell street, and subsequently from about 1870 the street has been known as West Fourteenth street.

In the case of *Marcy v. Taylor*, 19 Ill., 637, the court said:

" . . . and acceptance may be shown by user by the public, as by travel, or by the acts of the public officers in repairing and keeping it up. But it can not be essential to the acceptance that they should repair the road, for it might never require repairs. Any other act on the part of the public which manifests an intention to accept, such as public

travel and use as a highway, is as satisfactory evidence of acceptance as repairs by the officers.”

In *Littler v. City of Lincoln*, 106 Ill., 368, the court said:

“The general doctrine has been repeatedly recognized by this court that to constitute a complete dedication there must be an acceptance. It is not essential that there should be any prescribed formal act of acceptance, but there must be user or some other act indicating acceptance, by those authorized in such matters to represent the public, to complete the dedication. *Gentleman v. Soule*, 32 Ill., 271; *Rees v. City of Chicago*, 38 Ill., 322; *Illinois Ins. Co. v. Littlefield*, 67 Ill., 368; *Town of Princeton v. Templeton*, 71 Ill., 68; *Fisk v. Town of Havana*, 88 Ill., 208.”

I am of the opinion that the passing of an ordinance by the City Council changing the name of streets would be construed by our courts as an act indicating the acceptance of the same for the use of the public.

Subsequently Block 10 of Section 19, which includes the alley sought to be vacated, was resubdivided by the owner, John J. Emery, into two sub-blocks and was recorded April 8, 1887, in Book 24 of Plats. At the time of the platting of said resubdivision of Block 10, a strict compliance was had with the statute vesting all the right to the streets and alleys in said block to the use of the public. I find that several transfers have been made to lots in said Sub-block 1 of Block 10, during which time grantees purchased lots in said subdivision in accordance with the plat of said block, and I am, therefore, of the opinion that as to the alley sought to be vacated the City of Chicago was vested with the title. I have nothing in my possession indicating that the Chicago Terminal Transfer Company has acquired any right in West Fourteenth street, except that they claim the use of said street upon the ground that no statutory dedication was had and the fact that they own the southerly portion of the west half of Block 10 and the northerly portion of Block 23; that the title passed to the middle of what was marked Fourteenth street on the city's plat of Section 19; that they own the south half of Fourteenth street marked on the plat from Leavitt street to a point a little west of the west line of South Irving avenue, extended

south, and that they also own the north half of Fourteenth street from the west line of Irving avenue, extended, to the east line of Oakley avenue, extended, nor have I any facts showing that the city has ever abandoned the use of said street.

I am informed by you that many residents of that neighborhood claim that the street has been continually used for many years. If that be so then the city would have acquired rights in said street by user, even though it is claimed that a common-law dedication of Section 19 was had. As I stated above, I am of the opinion that the act of the City Council in changing the name of said street is an acceptance of the same by the city for the use of the people, and that the resubdividing of Block 10, by the owner, in accordance with the statute, did vest in the city the title to the alley in question.

Yours very truly,

ROBERT R. JAMPOLIS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

OCTOBER 16, 1908.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

I am directed to reply to your recent communication, addressed to the Corporation Counsel, requesting an opinion as to the city's responsibility with respect to the removal of the Addison street bridge over the north branch of the Chicago river. From transmitted letters, it appears that the bridge was placed over the old channel by the city in 1898 and was moved from said point to its present location in 1907 by the Sanitary District; also that the channel under the bridge was constructed by the Sanitary District.

On March 3, 1899, an act of Congress was enacted requiring the consent of the Federal Government to the construction of a bridge over a navigable river. Said act also provides for the removal of such structures erected in violation of the provisions of this act by injunction proceedings.

On May 13, 1901, an amendment to the Sanitary District Act was passed giving the Sanitary District the right to construct bridges over the Chicago river and passing the control of said bridges, when constructed, to the City of Chicago.

In construing this amendment our Supreme Court holds that it is the duty of the Sanitary District to construct bridges made necessary by the alteration, widening or deepening of a channel.

Lussem v. Sanitary District, 192 Ill., 424.

The original erection of the bridge over the old channel by the City of Chicago antedated the passage of the act of March 3, 1899, and was, therefore, no violation of the law. The removal of the bridge to its present location in 1907 by the Sanitary District without the consent or approval of the Federal Government was contrary to law and created an unlawful obstruction of the highway.

I am, therefore, of the opinion that the Sanitary District has become amenable to the penalty of said act.

Under the authority given by the Cities and Villages Act to regulate the use of streets and to prevent and remove encroachments or obstructions upon the same, the City of Chicago passed the following general ordinances.

“Section 1862. The Commissioner of Public Works may direct the removal of any article or thing whatsoever which may encumber or obstruct any street, avenue or alley in the city.”

“Section 2129. The Commissioner of Public Works is hereby authorized to order any article or thing whatsoever which may incumber or obstruct any street, alley, public landing, wharf or pier within said city to be removed. If such article or thing shall not be removed within six hours after notice to the owner or person in charge thereof to remove same, or if the owner can not be readily found for the purpose of such notice, he shall cause the same to be removed to some suitable place to be designated by the said Commissioner. The owner of any article so removed shall forfeit a penalty of not more than ten dollars in addition to the costs of such removal.”

Any unlawful obstruction of a highway can be removed

at the expense of the person whose duty it was to effect the removal.

Hawley v. Harrall, 19 Conn., 142.

Sioux City v. Weare, 59 Iowa, 102.

For the reasons above stated I have reached the following conclusions:

First.—That the primary duty to either remove said bridge or change the plan of construction to meet the requirements of the Federal Government rests upon the Sanitary District.

Second.—That this duty may be enforced against said Sanitary District by injunction proceedings prosecuted under the direction of the Attorney-General of the United States.

Third.—That the Commissioner of Public Works may remove said obstruction at the expense of the Sanitary District upon its failure so to do after receiving notice as provided in aforesaid ordinance.

Yours very truly,

ALBERT W. MAY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

OCTOBER 21, 1908.

TO THE COMMITTEE ON STREETS AND ALLEYS, WEST DIVISION,
OF THE CITY COUNCIL.

Gentlemen:

In answer to your request for an opinion as to the rights of the Pittsburg, Cincinnati, Chicago & St. Louis Railway in Rockwell street, permit me to say:

The right of way of the road in question, as you, no doubt, are aware, is on and adjoining Rockwell street from Madison street, on the north, to Twelfth street, on the south. It lies within what is technically designated as the northeast quarter of Section 13, Township 39 North, Range 13. This land was subdivided by John A. Rockwell as Rockwell's Addition to Chicago, and the plat thereof was recorded in July, 1854. The plat in question shows Rockwell street was dedicated as

a sixty-six-foot highway from Madison street to Harrison street. The Chicago & Northwestern Railway Company has a right of way west of, adjoining and parallel with Rockwell street. This was secured by the following conveyances:

First.—From Madison street to Wilcox avenue a warranty deed from widow and heirs of John A. Rockwell to Chicago & Northwestern Railway, executed September 23, 1866, recorded October 30, 1866, conveying the east one and one-half acres of the north half of the northwest quarter of the northeast quarter of Section 13-39-13, being approximately the east 99 or 100 feet of the north half of the northeast quarter of the northeast quarter and including the west thirty-three feet of Rockwell street, subject to its prior dedication by plat.

Second.—Wilcox avenue to Adams street, William B. Ogden to Chicago & Northwestern Railway Company, September 18, 1869, conveying the east sixty-seven feet of Lot 20 in Block 2.

Third.—Adams street to Jackson street, William B. Ogden to Chicago & Northwestern Railway, warranty deed, June 23, 1868, conveying Lot 19 in Block 2.

Fourth.—Jackson street to Van Buren street, William B. Ogden to Chicago & Northwestern Railway, warranty deed, September 18, 1869, conveying the east sixty-seven feet of Lot 16 in Block 3.

Fifth.—Van Buren street to Harrison street, William B. Ogden to Chicago & Northwestern Railway, September 18, 1869, conveying east sixty-seven feet of Lots 22 and 23 in Block 4, all of the above being in Rockwell's Addition to Chicago.

The southeast quarter of Section 13-39-13 was subdivided by Carter H. Harrison as Harrison's Addition to Chicago. The plat of this subdivision shows Rockwell street a highway sixty-six feet in width. The Chicago & Northwestern Railway right of way adjacent thereto was acquired through the following conveyances:

First.—Agreement between Henry T. Duncan and Chicago & Northwestern Railway Company, August 30, 1864, as to the east 100 feet of the east half of the southwest quarter

of the southeast quarter of Section 13-39-13. The above agreement was followed by special warranty deed between same parties, executed July 10, 1877, recorded July 13, 1877, conveying the property above described. Said deed is recorded as Document No. 142,461.

Second.—Warranty deed of Seth Sheldon to Chicago & Northwestern Railway, January 7, 1870, conveying Lots 40 and 50 and east sixteen feet of Lot 48 in Block 2 in Harrison's Addition to Chicago, in the north half of the southeast quarter of Section 13-39-13.

Third.—Warranty deed, Durham to Chicago & Northwestern Railway, January 6, 1870, conveying Lot 2 and the east sixteen feet of Lot 3 in Block 2 in Harrison's Addition.

Fourth.—Warranty deed of Seth Sheldon to Chicago & Northwestern Railway, January 7, 1870, conveying Lots 49, 50 and east sixteen feet of Lot 48 in Block 3 in Harrison's Addition.

Fifth.—Warranty deed, Durham to Chicago and Northwestern Railway, January 1, 1870, conveying Lots 1, 2 and the east sixteen feet of Lot 3 in Block 3 in Harrison's Addition.

Sixth.—Warranty deed, Carter H. Harrison to Chicago & Northwestern Railway, executed November 27, 1875, recorded March 4, 1876, as Document No. 75,125, conveying Lots 1, 2 and 3 in Block 6 in Harrison's Addition.

Seventh.—Warranty deed, Carter H. Harrison to Chicago & Northwestern Railway, executed November 27, 1875, recorded March 4, 1876, as Document No. 75,124, conveying Lots 1, 2 and 3 in Block 7 in Harrison's Addition.

The right of way of the Chicago & Northwestern Railway Company and that of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company are parallel, contiguous and practically united. No dedication was ever made of that part of Rockwell street from Harvard street to Twelfth street, nor was it ever used, so far as we are informed and advised, as a highway. The ordinance of January 18, 1897, requiring the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and the Chicago & Northwestern Railway Company to elevate their tracks did not vacate Rockwell street, but the

east one-half of said street, from the south line of Monroe street to the north line of Harrison street, was vacated by Section 17 of an ordinance for the elevation of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, the Chicago & Northwestern Railway Company and the Chicago, Milwaukee & St. Paul Railway, for Kinzie street, from Ashland avenue to Kedzie avenue. (See Council Proceedings, February 11, 1901, page 2120.)

This vacation occurs in an ordinance dealing with track elevation of a railroad right of way remote and separate from Rockwell street and is not indexed as a street vacation in the Council Proceedings.

On February 11, 1901, the City Council passed an ordinance vacating the east thirty-three feet of Rockwell street from the south line of Monroe street to the north line of Harvard street, to the Pittsburg, Cincinnati, Chicago & St. Louis Railway, on condition the said railway company lay out and dedicate a street thirty-three feet in width, from Jackson street to Monroe street, and a twenty-four-foot wide street from Harrison street to Harvard street. The superintendent of the Map Department advises me that this condition has not been complied with, in so far as the records of his office disclose, nor has the railroad company taken possession of the east thirty-three feet from Jackson street to Harrison street. The records of the Map Department show Rockwell street to be sixty-six feet wide from Madison street to Twelfth street, and also the railroad right of way, approximately seventy-five feet wide west of, parallel with and adjacent to, the west line of Rockwell street. There is no other ordinance or part of an ordinance other than that hereinbefore referred to vacating any part of Rockwell street or permitting the use of same to a railroad right of way.

I am advised and informed that prior to the annexation of the territory, within which this street lies, to the City of Chicago, a railroad right of way was operated and maintained along and upon it. If this be true, I hold, as a legal proposition, that it was annexed to the City of Chicago and taken with the burden of the existing easement.

There is no record antedating the great fire of 1871

touching this matter. I am of the opinion that the rights of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company in Rockwell street are coextensive, if not of the same character and derived from the same source, as the Chicago & Northwestern Railway Company's rights, the details of which are embodied in this communication.

Yours very truly,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

. OCTOBER 21, 1908.

WILLIAM J. PRINGLE, Esq., Alderman, Third Ward.

Dear Sir:

Pursuant to your verbal inquiry of yesterday, concerning the status of our city ordinances and the statutes of Illinois regarding venders of patent medicine in the streets of Chicago, and as to whether or not arrest of nonlicensed sellers of patent medicine may be made without warrant, I desire to advise you as follows:

Section 12 of Chapter 91, relating to "medicine and surgery," provides for the payment of a license fee of \$100.00 per month by any itinerant vender of any drug, nostrum, ointment or appliance of any kind intended for the treatment of diseases or injury, who shall by writing or printing or any other method profess to the public to cure or treat disease or deformity, etc.

This license fee is to be paid to the State, and a license is to be issued by the State Board of Health.

The Revised Municipal Code of 1905, in Section 1590, defines a peddler as follows, "Every person who shall sell or

offer for sale, barter or exchange at retail, any goods, wares, merchandise, fruits, vegetables or country produce, traveling from place to place on, along or upon the streets of the city . . .” This section also provides that no person shall engage in, or conduct the business of a peddler, as above specified and defined, without a license under the penalty of not less than \$20.00 nor more than \$50.00 for each offense.

There is no doubt but that a person who offers for sale, at retail, along the streets of the city, patent medicine, is subject to the provisions of the above quoted section of the code, and if such person fails to take out a license pursuant to the said section, or in compliance with the statutory provision above cited, such person is liable to arrest “on view,” there being absolute statutory authority for the arrest of such person without warrant.

See Paragraph 12, Section 83, Cities and Villages Act (Hurd’s Revised Statutes 1906, page 306) :

“CONSERVATORS OF THE PEACE—POWERS OF.—Sec. 12. The trustees in villages, the mayor, aldermen, and the marshal and his deputies, policemen and watchmen in cities, if any such be appointed, shall be conservators of the peace, and all officers created conservators of the peace by this act, or authorized by any ordinance, shall have the power to arrest or cause to be arrested, *with or without process, all persons who shall break the peace, or be found violating any ordinance of the city or village, or any criminal law of the State*, commit for examination and, if necessary, detain such persons in custody over night or Sunday in the watch house or any other safe place, or until they can be brought before the proper magistrate, and shall have and exercise such other powers as conservators of the peace as the City Council or Board of Trustees may prescribe. All warrants for the violation of ordinances, and all criminal warrants to whomsoever directed, may be served and executed within the corporate limits of any such city or village by any policeman of such city or village; such policemen being hereby clothed with all the common law and statutory power of constables for such purposes.” (As amended by act

approved June 14, 1883. In force July 1, 1883. Laws of 1883, page 58; Legal News Ed., page 56. See Sec. 21.)

Yours very truly, -

HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

OCTOBER 21, 1908.

TO THE COMMITTEE ON PUBLIC LANDS.

Gentlemen:

Agreeable to your request, I hereby transmit to you an opinion as to the right of the City of Chicago in Front street between One Hundred and Fifteenth street and One Hundred and Sixteenth street, which is claimed by the Illinois Central Railroad Company as part of its right of way.

It appears from copies of records, furnished by the Chicago Title & Trust Company, that Samuel Burson purchased from Charles Buhl, March 16, 1852, for the Michigan Central Railroad Company, the southeast fractional quarter of Section 22-37-14, and that about the same time the Illinois Central Railroad Company located the northeast quarter of Section 22 as part of its government grant and also purchased a right of way from Charles Buhl through the southwest quarter of said section, and I am informed that subsequently the Michigan Central Railroad Company constructed for the Illinois Central its line from Calumet station to Chicago.

It appears that a depot was built by the two roads at the foot of what is now called One Hundred and Sixteenth street; that the only street through Section 22 prior to 1856 was the old Chicago and Michigan City road, now called Michigan avenue, which road before the days of railroads was one of the main lines of travel between Chicago and points south thereof; that the farmers' access to the lake was cut off by reason of the building by the railroad of its tracks, ditches and fences; the railroads at that time owned all of the shore

line; the depot was about one-half mile from the nearest and only road above mentioned.

The statutes of Illinois in force in 1856 authorized the Highway Commissioners to lay out roads upon certain conditions, and the required number of legal voters petitioned the Highway Commissioners of the Town of Worth to lay out a road to the lake; this road ran to the bridge over the Illinois Central right of way; the road terminated at a "rock" on the bank of the lake and ran to the "switch" where the two railroads joined.

From pages 88 and 89 of a book in the custody of the Town Clerk of the Town of Worth, which is the only record book of proceedings of said town, and of the Commissioner of Highways of the Town of Worth from April 2, 1850, to November 4, 1868, it appears that said road was subsequently in part vacated and a new road laid out, of which a portion of the strip now called Front street was a part; it also appears that the Commissioners reported that a survey was made in accordance with the petition as prayed for. This second road was a direct road from the old Chicago and Michigan City road to the depot and it appears that F. D. Rexford, who, from 1854 to 1868, was the agent for both railroad companies, states that in behalf of said companies he entered into negotiations with Buhl, the owner of the southwest quarter section, to have the road laid directly to the depot, and, in behalf of the companies, agreed to build and keep the same in repair. Mr. Rexford also states that the companies made an appropriation of \$100 for building the same, and that the road was built out of said appropriation; this is corroborated by the semi-annual report of the Highway Commissioners of September 8, 1857, which states that an appropriation is required in building the road between Blue Island and Calumet station of the Illinois Central Railroad, said company having subscribed \$100 to the same and having built a road for the same of 1,100 rods in length (the distance of the second road being about 1,200 rods). It appears that the petition to the Highway Commissioners for the second road bears the signatures of Buhl, Andrews, the surveyor, and Rexford, the agent of the two companies.

The report of the Commissioners partly vacating the first road and ordering the second road shows a plat made July 9, 1857, which plat shows the vacation of the old road and the relocation or laying out of the new road. This plat (a copy of which is hereto attached) shows both the vacated and the new road and distinctly shows a portion of the same laid out for a street which was located from what is now One Hundred and Sixteenth street to about half way between the present location of One Hundred and Fifteenth street and Kensington avenue, and which is now a part of Front street.

This part of Front street has been used by the public up to the present time and was never fenced in.

In 1866 the Illinois Central sold its northeast quarter, reserving its right of way. The only street leading to this land was the one from the main road by way of One Hundred and Sixteenth street to Front street and by way of Front street to the bridge (which was located about half way between the present location of Kensington avenue and One Hundred and Fifteenth street) and across said bridge to the road east of the Illinois Central, and then to One Hundred and Fifteenth street and the company's land. In the same year (1866) the Michigan Central sold its southeast quarter of Section 22 to John Gilbert. From 1852, when Benson purchased the southeast quarter of Section 22 for the Michigan Central, up to 1866, when the Michigan Central sold to Gilbert, there appears to be no record of a grant or easement across said quarter section to the Illinois Central, and the records of Cook County, from the first conveyance by the Government to August 17, 1908, shows no title in the Illinois Central Railroad as to any right of way through the southeast quarter of Section 22. The sales of land made by the two railroad companies were made with the knowledge that Front street, as above described, was open to the public. In 1867 John Gilbert sold to John Gohring that part of the old Michigan Central land west of the Illinois Central Company's right of way and in his deed excepted all public highways; the only public highway crossing said land was One Hundred and Sixteenth street; Front street lay along the east line of the piece so sold from One Hundred and Sixteenth

street to the bridge. In 1869 Gohring sold a part of the last above mentioned land to one Oviatt, and it was he who platted the subdivision known as "Kensington," covering about fifty-one acres.

On March 28, 1870, Jones & Sellers made an abstract of the piece of land in the southeast quarter of Section 22, bought by Oviatt from Gohring in 1869, and in that abstract they show a map covering the land and showing One Hundred and Sixteenth street across the southerly corner of the tract, and Front street on said railroad right of way and adjoining said piece, from One Hundred and Sixteenth street to Kensington avenue; this map was made prior to the Chicago fire and is apparently a part of the map of "Kensington" as approved by the Trustees of the Village of Hyde Park, of which village this land formed a part, September 18, 1869.

Nicholas Overtoom, an old resident, says that he assisted in making the improvements in the subdivision known as "Kensington." In 1869 he graded its north line, One Hundred and Fifteenth street, from the old Chicago and Michigan City road to the Illinois Central Railroad; at the railroad there was a crossing which connected the road which was being graded with that part of One Hundred and Fifteenth street east of the railroad laid out at an earlier date. Mr. Overtoom says that at that time Front street was in use from One Hundred and Sixteenth street to One Hundred and Fifteenth street, and is corroborated by several witnesses, some of whom say that it was in use up to One Hundred and Fifteenth street as far back as 1865. At about the same time the Illinois Central depot was moved north to its present site, and as there was no longer any public need for the crossing at the bridge, it was closed by the railroad company; the crossing at the bridge had been sixty-six feet wide, Front street was sixty-six feet wide, One Hundred and Fifteenth street was laid out sixty-six feet wide and as the extension of Front from the bridge to One Hundred and Fifteenth street followed the same ditch line as that of the old the extension remained the same in width.

In 1871 the Chicago fire destroyed the public records and among them the record of the map of "Kensington" subdivision.

Dobson & Rhoades' atlas of 1872, an atlas of the south half of Hyde Park (one of which is in the hands of the Chicago Title & Trust Company) shows Front street as it appears in the Jones & Sellers abstract, but drawn to a better scale; Dobson was engineer for the Village of Hyde Park, and his was the official atlas of the village. This atlas does not show the road from the "bridge" to the "rock"; it appears that the atlas was not based in any part upon the records of the towns of Worth and Calumet, or upon the proceedings of the Highway Commissioners of those towns.

I am informed that up to about 1880 the Illinois Central had possibly two tracks upon their right of way and there was an abundance of room for the railroad and the public and the use of Front street from One Hundred and Sixteenth street to One Hundred and Fifteenth street continued free, open and undisputed. Fronting on said street there were several houses, at that time, whose only ingress and egress was by way of said street, and witnesses say that from 1880 "Kensington" grew rapidly and the land adjoining Front street from One Hundred and Fifteenth street to Kensington avenue was soon built up solid and became famous through the city as the block of saloons; some were expensive brick buildings and all were from within three feet to six feet of the so-called railroad line.

Front street contained some stone, had the usual traffic of a street, and had sidewalks and lamps.

During September, 1880, the State's Attorney of Cook County brought proceedings in the Circuit Court of Cook County for the reestablishment of the record of the map of "Kensington," but this map shows only the land covered by the subdivision and not the street (Front street), so far as it lies east of the land subdivided.

In March, 1883, Greeley, Carlson & Co., published an atlas of the south half of Hyde Park; I am informed that they have stated, since then, in preparing said map, it did not occur to them to consult the records of Worth and Calumet; this atlas is claimed to be exhaustive in its search of the records of Hyde Park as to streets opened and vacated; but no vacation of Front street appears thereon nor does the

atlas show Front street nor any other streets laid out by the Highway Commissioners. I am informed that this atlas was used by the Village of Hyde Park and that the present City of Chicago atlases are based upon it; the city atlas shows no vacation of Front street, and the Chicago Title & Trust Company certify that no vacation appears of record.

The following is a list of different assessments made from time to time and levied on property facing Front street between One Hundred and Fifteenth street and Kensington avenue:

1881. Hyde Park Warrant No. 130, for water pipe in One Hundred and Fifteenth street.

1881. Hyde Park Warrant No. 131, for water pipe in Kensington avenue.

1895. City of Chicago Warrant No. 21124, for 10-foot plank walk in Front street.

1895. City of Chicago Warrant No. 21343, for main sewer.

1897. City of Chicago Warrant No. 22652, for sewer in "I. C. R. R. right of way" to One Hundred and Fifteenth street and in Front street from Kensington avenue to One Hundred and Sixteenth street. The ordinance for this improvement was passed by the City Council March 1, 1897, and December 24, 1896, an agreement was made between the city and the company whereby the company grants the city the right to lay a 12-inch pipe sewer on a line five feet east of the west line of its right of way between the south line of One Hundred and Fifteenth street and north line of Kensington avenue.

1899. City of Chicago Warrant No. 24010, for paving Kensington avenue.

1899. City of Chicago Warrant 24090, for paving One Hundred and Fifteenth street.

1907. City of Chicago Docket No. 32079, for 6-foot cement walk in Front street.

Hyde Park proceedings for 1888-1889, page 109, shows report and order to expend \$150 for repair of Front street, provided Illinois Central Railroad contribute like amount. The atlas in the Water Pipe Extension Department shows a

four-inch main in Front street, but does not give the date when same was laid. It appears, also, that the gas main was laid, street lamps and stubs or service pipes connecting the gas, water and sewer mains with the houses facing on Front street. On September 18, 1890, an agreement was made between the Illinois Central and certain officials of the city by which the Illinois Central purports to lease to the City of Chicago a strip of land twenty feet wide on the west side of its right of way between One Hundred and Fifteenth and One Hundred and Sixteenth streets, to be used as a public street for the period of five years. This was in consideration of \$1; this lease is signed by the railroad company by C. A. Beck, Gen. Mgr., by one King. This lease is not signed by any representative of the city. A second lease, dated September 13, 1892, purports to lease the same strip for a public street in consideration of \$1 for the period of three years. This lease is signed by the Illinois Central Railroad Company by J. T. Harahan, Second Vice-Pres., and the same bears the seal of the City of Chicago and is signed by Hempstead Washburn, Mayor, and attested by Jas. R. B. Van Cleave, City Clerk, and H. N. May, City Comptroller; the back of said purported lease shows that the time was extended until the 10th day of August, 1898, upon the same terms and conditions and bears the signature of the Illinois Central Railroad Company by J. C. Welling, Vice-Pres., and City of Chicago by O. D. Wetherell, Comptroller. Also the following extension from 1898 to August 10, 1901, on the same terms and conditions and signed by the railroad company by J. C. Welling, Vice-Pres., and City of Chicago by R. A. Waller, City Comptroller. Also the following extension from 1901 to August 10, 1903, signed by the railroad company by J. T. Harahan, Second Vice-Pres., and City of Chicago by L. E. McGann, City Comptroller. Also the following extension from 1903 until August 10, 1905, upon the same terms and conditions and signed by the railroad company by J. T. Harahan, Second Vice-Pres., and City of Chicago by L. E. McGann, City Comptroller. Another lease was made on the 10th day of August, 1905, between said parties in consideration of \$1 until the first day of May, 1909, on the following property: beginning at the intersection of

the west Wayland line of the Illinois Central Railroad and south line of One Hundred and Fifteenth street, thence south on said Wayland line to the north line of One Hundred and Sixteenth street produced, thence east on said north line of One Hundred and Sixteenth street twenty-two feet, thence north parallel to said Wayland line to the south line of One Hundred and Fifteenth street, thence west along last named street line to the point of beginning, to be used for the purposes of a public street. This lease is signed by the railroad company by J. T. Harahan, Second Vice-Pres., and City of Chicago by L. E. McGann, City Comptroller.

From the above statement of facts we find that the Highway Commissioners complied with the provisions of the statute in force in 1856 and laid out the road subsequently called Front street and that the same was used by the public from that time on; and that the road was laid out with full knowledge on the part of the railroad company; that no enclosure was ever had of the same and that the legality of the action of the Highway Commissioners was never questioned by any one; that at the time the railroad company sold the land adjoining its right of way in 1866 the sales were made with the knowledge that Front street lay along the east line of the land sold, from One Hundred and Sixteenth street to the bridge, which was located about half way between the present location of One Hundred and Fifteenth street and Kensington avenue. The plat of "Kensington" subdivision made in 1869 shows Front street adjoining said railroad right of way on the west from One Hundred and Sixteenth street to Kensington avenue; that the Jones & Sellers abstract of March 28, 1870, showing the subdivision of "Kensington" which was bought by Oviatt in 1869, shows Front street adjoining said piece of land, and that the Village of Hyde Park approved the map of "Kensington" September 27, 1869.

Thus we find Front street from One Hundred and Sixteenth street to about half way between the present location of One Hundred and Fifteenth street and Kensington avenue, open from about the year 1857 until the year 1866; and Front street from One Hundred and Sixteenth street to One Hundred and Fifteenth street, open from about 1866 to 1871,

and in undisputable possession by the public, up to that time. From all facts before me I can find no claim on the part of the railroad companies that Front street was still a part of their railroad right of way; for fourteen years and up to 1871 we find Front street recognized upon the records of the towns of Worth, Calumet and Hyde Park, and on the records of the Recorder of Cook County.

As above stated, in 1869 the north line of "Kensington" subdivision (being One Hundred and Fifteenth street) was improved from the old Chicago and Michigan road to the Illinois Central Railroad, and from then to the present time Front street has been in constant use by the public from One Hundred and Fifteenth to One Hundred and Sixteenth streets. The Dobson & Rhoades atlas of 1872 shows that Front street was recognized as a street after the Chicago fire. That about 1880 buildings were erected facing Front street and that the same has been, and is, used for public traffic and by the owners of the property adjoining the same for ingress and egress up to the present time; we find also that since 1881 various assessments were levied on property facing Front street between One Hundred and Fifteenth and One Hundred and Sixteenth streets for improvements in Front street and neighboring streets.

That part of Front street between One Hundred and Sixteenth street to about half way between the present location of Kensington avenue and One Hundred and Fifteenth street, having been laid out according to the provisions of the law in force in 1857, accepted by the public and continually used from forty to fifty years, and the improvements made on said street and the adjoining property having been assessed from time to time, tends to show title in the City of Chicago for the use of the public.

As to that part of Front street located from about half way between Kensington avenue to One Hundred and Fifteenth street, old residents state that the same was open in 1869, and even before that time, and has continued so up to the present time. It has been constantly used by the public as a thoroughfare and was originally, when Front street was extended by use of the public, about sixty-six feet wide, west

of the railroad right of way, and I am informed that up to about the year 1883 Front street remained in that condition. Subsequently the railroad company placed tracks on a part of the same so that at the present time about twenty-two feet, more or less, remain for the use of the public; but this part of Front street has remained unobstructed in its use as a thoroughfare from about the year 1869; I am unable to get the exact information as to when these tracks were, from time to time, placed upon a part of the sixty-six foot street last above referred to, but as to the remaining twenty-two feet, more or less, I am inclined to the opinion that the City of Chicago has acquired an easement therein for the use of the public by prescription for more than twenty years.

The alleged lease of September, 1890, between the Illinois Central and the City of Chicago for a strip twenty feet wide on the west side of its right of way between One Hundred and Fifteenth and One Hundred and Sixteenth street, to be used as a public street, made for the period of five years in consideration of \$1, and the subsequent leasing of the same number of feet, from time to time, up to August 10, 1905, and a third lease, made in 1905, expiring May 1, 1909, which was for twenty-two feet instead of twenty feet of the right of way as above described, I believe to be of no force whatever. No doubt the action of the city officials in attempting to lease this strip of land was made under the misapprehension and under the belief that no street ever existed adjoining the property on the west side thereof.

I can find nothing in the City Charter or in the Cities and Villages Act which would empower either the City Council, or its officers, to acquire the use of a street in this manner. In 1856, in the case of *Alford v. Ashley*, 17 Ill., 368, the court said:

“The court very properly instructed the jury that a highway could be established and proven by prescription, by dedication and by laying out the same in the manner provided by law.”

The statute of this State lays down the method for acquiring property for street purposes and for other public improve-

ments. In *Litz v. West Hammond*, 230 Ill., 315, the court said:

“Where private property must be acquired for the making of any local improvement to be paid for in all or in part by special assessment the statute requires that the title thereto shall be obtained by condemnation proceedings.”

Citing *Snydacker v. West Hammond*, 225 Ill., 154.

Hyde Park v. Spencer, 118 Ill., 446.

Hurd's Rev. Stat. 1905, Chap. 24, Sec. 519.

In *City of Chicago v. Hayward*, 176 Ill., 134, the court said:

“The mode of making local improvements, as opening streets and the like, is a matter of discretion with the municipal authorities, and is not subject to judicial control. Payments may be made in any mode provided, and may be out of general funds, by special taxation or by special assessment, and the adoption of either mode by an ordinance of the city excludes the idea of payment in any other manner. People v. Village of Hyde Park, 117 Ill., 462. The act provides the manner in which the municipality may acquire lands for the purposes of a street, and that must be by the adoption of an ordinance. It cannot acquire lands for such purpose by private purchase, as such a practice would lead to favoritism and corruption. Where the statute provides a specific manner of acquiring property for such purpose, by a familiar rule of construction it impliedly forbids its being done in any other manner. *C. & N.-W. Ry. Co. v. City of Chicago*, 148 Ill., 141.”

Dillon says, in his work on *Municipal Corporations*, Section 457:

“That the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principal, and that it is the part of true wisdom to *keep the corporate wings clipped down to the lawful standard*. It results from this doctrine that contracts not authorized by the charter or by other legislative act, that is, not within the scope of the powers of the corporation under any circumstances, are void, and in actions thereon

the corporation may successfully interpose the plea of 'ultra vires,' setting up as a defense its own want of power under its charter."

"When the act complained of is *ultra vires* in the sense of being in connection with a matter wholly beyond the scope of corporate powers, a city can not be held liable for the torts of its officers, agents or servants. . . ." Am. & Eng. Enc. of Law, 2d Ed., Vol. 20, page 1201.

In *City of Chicago v. Shober & Carqueville Lithographing Co.*, 6 Ill. App., 561, the court held:

"All persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make contracts."

Citing Dillon on Municipal Corporations, Section 272, and cases in notes.

In the case of *City of Chicago v. Turner*, 80 Ill., p. 422, the court held that where the act complained of lies wholly outside of the general or special powers of the corporation it can in no event be liable whether it directly commanded the performance of the act or whether it be done by its officers without its express command. Citing Dillon on Municipal Corporations, 1st Ed., page 724.

Assuming, for the moment, that the provisions of the statute in laying out the road in 1856 had not been complied with, still, Front street having been opened and used by the public from One Hundred and Sixteenth to One Hundred and Fifteenth streets from about the year 1866 until 1890, when the first alleged lease was made to the City of Chicago, the public would nevertheless have acquired title by prescription, having had the uninterrupted possession and use of the same for nearly twenty-five years.

In *Town of Lewiston v. Proctor*, 27 Ill., page 417, the court held that the uninterrupted use of the road by the public for a period of over twenty years has, wherever the common law obtains, always created a prescriptive right to the use of the road, and this right continues until it is clearly and unmistakably abandoned, and our courts have, from time to time, confirmed the opinion of the court rendered at that time; and

in the late case of Road District No. 1 v. Silas E. Beebe, 231 Ill., page 149, the court said:

“Under our statute with reference to user, which is here applicable, it is a matter of perfect indifference whether the highway authorities did not at any particular time regard the road as a public highway. (Hurd’s Rev. Stat. 1905, Chap. 121, Par. 176; Township of Madison v. Gallagher, 159 Ill., 105.) It is user by the public that creates the highway by prescription under the statute.”

The alleged lease between the Illinois Central and the City of Chicago, made from time to time, in one instance bears the names of the Mayor, City Clerk and Comptroller of the City of Chicago and in the extensions and the other two alleged leases the name of the Comptroller only appears.

I am forced to the conclusion that the acts of the Mayor, City Clerk and Comptroller who conducted the alleged leasing of Front street between One Hundred and Sixteenth and One Hundred and Fifteenth streets were *ultra vires*, and hence of no effect whatever. It would be, indeed, unjust to say that the public could be deprived of its rights legally obtained and held for a period of forty or fifty years in the absence of any power granting the City Council or its officers such rights. Here every act to constitute Front street a public thoroughfare was recognized by the municipal corporations of which the subdivision in which said street is located, at different times formed a part, and the street during all that time constantly used by the public; it can not be said that because of an omission on the part of the makers of the atlases subsequently in leaving off the streets originally laid out and acknowledged as such by the towns of Worth, Calumet and Hyde Park, nor the action of the State’s Attorney in filing proceedings in 1880 to establish the plat of the subdivision of “Kensington” in omitting Front street therefrom, can in any way deprive the people of their rights in said street, especially in view of the fact that the street has been open from One Hundred and Sixteenth to One Hundred and Fifteenth streets, and the property owners assessed for public improvements for a period of time covering fully twenty-six or twenty-seven years.

I have caused a search of the ordinances of the Village of

Hyde Park before annexation and the ordinances of the City of Chicago since then to be made, and I am informed that no action of the City Council vacating the premises in question can be found. I am of the opinion :

First, that Front street from One Hundred and Sixteenth street to a point located about half way between Kensington avenue and One Hundred and Fifteenth street became a legal thoroughfare by reason of its having been laid out by the highway commissioners in 1857 in accordance with the provisions of the statutes of the State of Illinois in force at that time. I am further of the opinion that the City of Chicago is entitled to the use of the same for the public to its full width, sixty-six feet, no part of the same having ever been vacated according to law.

Second, that part of Front street from a point located about half way between Kensington avenue and One Hundred and Fifteenth street, although originally about sixty-six feet wide, has since the year 1883 been partly taken up by the railroad company and its tracks placed on the same so that for the last twenty-five years about twenty-two feet, more or less, has been in use by the public, and as to that twenty-two feet, more or less, I am of the opinion that the City of Chicago has acquired an easement therein for the use of the people, by prescription for more than twenty years.

Third, neither the charter of the City of Chicago nor the Cities and Villages Act gives to the City Council or its officers the right to acquire the use of a street by contract or by leasing the same. I am, therefore, of the opinion that the action of the Mayor, City Clerk and Comptroller in making the alleged leases was *ultra vires* and of no effect whatever.

Yours very truly,

ROBERT R. JAMPOLIS,
Assistant Corporation Counsel.

Approved :

EDWARD J. BRUNDAGE,
Corporation Counsel.

OCTOBER 30, 1908.

JOHN H. JONES, Esq., Alderman, Eighth Ward.

Dear Sir:

Complying with your written request of the 24th inst., this Department instituted an inquiry into the right and authority of the city to require the alley to be kept open lying between Bond and Lake avenues, and bounded on the north by Seventy-eighth street and on the south by Cheltenham place.

The primary question with which the city is concerned is: Was this closed alley a public or private alley? Only in the event of its being public would the city have any right or authority to insist upon its being kept open.

Our investigation discloses the information that on September 21, 1888, A. R. Porter was the owner of the tract of land within which this alley lies; that on that date he filed a plat with proper certificate attached, which was recorded as Document No. 1,700,082, dedicating the alley in question as a private alley.

In a very important case on this subject our Supreme Court said:

“The owner of the property might subdivide it in such way as to establish over it *private ways* for the *sole* benefit of those who might become owners of the lots in the subdivision, and in which the public, as such, would have no interest, and over which the public would have no control.”

City of Chicago v. Drexel, 141 Ill., 89.

The leading case in this State upon the legal questions involved contains this terse expression: “Where a way is *opened* as a *private way*, and intended as such, and this can be shown, no length of use by others will make it a public way.”

City of Chicago v. Borden, 190 Ill., 446.

Washburn on Easements and Servitude, 2d Ed., page 1844.

In considering a question very similar to that presented by your communication, the Supreme Court of Indiana, in

language adopted and approved by the Supreme Court of Illinois, says:

“Where the owners of land devote a portion of it for use as an alley or passage-way for their own private purposes, such alley or passage-way will not be converted into a public highway simply because the public also uses it by permission from the owners.”

Shellhouse v. State, 110 Ind., 512. (Quoted with approval in *City of Chicago v. Borden*, *supra*.)

As to your request to have the deeds from R. W. Bridge to A. R. Porter examined for the purpose of ascertaining what, if any, reservation of the alley in question they contained, I have to say, the city is in no manner concerned with such reservations, for the reason, they could not possibly operate, in legal effect, to change a private alley into a public one. The Illinois Supreme Court has said:

“It matters not in what way the grantors from Lindley down to appellants may have described the premises they conveyed and as bounded by an alley; *that does not bring the alley into existence as a public alley, nor does their saying so make it so.*”

Illinois Ins. Co. v. Littlefield, 67 Ill., at page 372.

After a careful examination of the legal questions involved, I am of the opinion that the alley in question is a *private* one and that the city has no right and authority to insist upon its being kept open for the public use.

This opinion does not assume — but on the contrary expressly disclaims — any intention to deal with or pass upon the private rights of abutting property owners. It simply considers and passes upon those matters with which the city is or can be concerned.

Yours very truly,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

NOVEMBER 2, 1908.

WILLIAM J. ROBERTS, Esq., Chairman, Subcommittee on
Streets and Alleys, South.

Dear Sir:

In reply to your verbal request for a statement of the limits on the power of the City Council in vacating streets and alleys, I beg to say that the latest and most comprehensive decision by the Supreme Court on this subject is found in the decision of *People ex rel. Friend, et al., v. Wieboldt, et al.*, 233 Ill., 572. The vacation there under discussion was of a portion of an alley between and immediately adjoining lots owned by William A. Wieboldt. In consideration thereof Wieboldt agreed to do certain paving, to pay the city an annual compensation and to dedicate to the city portions of other lots on each side of the vacated strip, thus giving a right angle outlet to the two inside ends of the old alley to another street. The main contention of the parties objecting to the vacation was that the ordinance was passed for the sole benefit of Wieboldt, a private individual, and was, therefore, void, but after a careful review of its former decisions the court held that this feature was not material.

1. As to the general power of the City Council to vacate streets and alleys the court says, page 577:

"The authorities . . . recognize the fact that a municipal corporation, when the municipal authorities, in the exercise of the discretion reposed in them, determine that a public street or alley is no longer required for public use, have the right to vacate such street or alley; and such must necessarily be the rule in force in this State, *or the power conferred upon such municipalities by the statute would be entirely abrogated.*"

It is further said:

"Whether it is expedient to vacate a street or alley is a question for legislative decision, and when the authority to discontinue is delegated to local officers and no restrictions are placed upon its exercise, the officers are invested with a very broad discretion, and unless their discretion has been abused the courts can not interfere. This is in accordance with the general rule that where officers are invested with

discretionary powers, courts will not substitute their judgment for that of the officers invested by law with the right to determine upon the necessity or expediency of doing a designated act."

And the court cites the case of *Meyer v. Village of Teutopolis*, 131 Ill., 552, to the effect that the power to vacate or discontinue streets, "when exercised with due regard to the rights of individuals, will not be restrained at the suit of a property owner claiming that he is interested in keeping open the streets."

2. With reference to the argument that the ordinance was passed for the purpose of vesting Wieboldt with title to the vacated alley it was said, page 579:

"Neither is the vacation of the alley affected by the fact that the portion of the alley vacated may, as a result of the action of the City Council, have become the private property of Wieboldt. In the *Meyer case*, on page 556, it was said: 'Nor can it be said that the validity of the proceedings by which a street is vacated is at all affected by the fact that the land embraced within the street thereby becomes private property. Nor is it material whether private ownership results from the rule that, upon the discontinuance of an easement in a public highway, the freehold or soil reverts to the owner of the adjoining land or that such ownership is acquired by subsequent conveyance from the municipality. Nor does it seem material that the vacation is made with the view or intention of vesting the adjoining proprietors with the ownership of the land embraced within the street. That merely goes to the motive by which the act of vacation is performed, and in that, as in all legislative acts, the motives by which the legislative body is actuated are immaterial and can not be inquired into. Cooley's Const. Lim. (5th ed.), 222; Dillon on Mun. Corp., Sec. 313.' and in *Parker v. Catholic Bishop*, *supra*, on page 165: 'It can make no difference, as to the power of the municipality, whether the fee remains in the city, reverts to the original dedicator or passes by operation of law to the adjoining owners; nor will the fact that the use of the alley or street passes to a private individual or

corporation necessarily render it an exercise of power for a private and not for a public purpose.' ”

3. The court was careful to point out in this case that the persons objecting to the vacation were not deprived thereby of immediate access to their own property. It was said:

“The relators in this case were not deprived of the use of the alley in the rear of their property or of access to and from the public streets of the city, and this court can not say, as a matter of law, that the inconvenience to which they are put by the change made by the ordinance is such a clear abuse of the discretion vested in the city council as to justify this court in holding the ordinance void.”

The court also quoted from *Village of Hyde Park v. Dunham*, 85 Ill., 569, to the effect that:

“Property owners purchase and hold subject to these powers (to contract or widen streets) and they have no vested right to deny the widening, contracting or otherwise improving any street. The damage which they may sustain in consequence of the exercise of such powers, *where their property is neither taken nor directly injured thereby*, is too remote and contingent to be susceptible of accurate computation, and if for every such damage compensation must be made, public improvements will become so burdensome as to be beyond the capacity of municipal corporations to bear.”

Had the vacation deprived the objecting property owners of the direct right of ingress and egress to and from their own premises, this feature, even if it were not held to constitute such an abuse of the legislative discretion as would invalidate the ordinance, would certainly entitle the injured abutting owners to compensation for the damages sustained by them.

In *City of Chicago v. Union Building Association*, 102 Ill., 397, it is said, page 397:

“Property holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets, which can not be taken away or materially impaired by the city without incurring legal liability to the extent of the damages thereby occasioned, and to this extent, perhaps, it may be said there is a special trust

(not shown in the present case to have been affected) in favor of adjoining property holders. But in no other respect do the property owners or citizens of the municipality have a right in the street other or different than that of the public generally.”

It may be observed that in deciding the Wieboldt case two members of the court, in a separate opinion, objected to holding that the Council was authorized to vacate this alley in favor of a private individual. They said, page 582:

“This court has repeatedly held that cities hold their streets and alleys in trust for the use and benefit of the public, and they have no power to vacate them for the purpose of devoting them to the exclusive use and benefit of a private person.”

Inasmuch, however, as the remaining five justices were agreed upon the principles above set forth, they must be taken as the existing law of this State.

Yours very truly,

WILLIAM K. OTIS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

NOVEMBER 2, 1908.

BERNARD W. SNOW, Esq., Chairman, Committee on Compensation.

Dear Sir:

In response to your request for an opinion as to whether or not the city has ever made any proper acceptance of the alley in Gerrish & Eile's Resubdivision, Sheffield's Addition, and what right the city has, if any, to the alley in question, permit me to say, assuming the statement of fact submitted by counsel for the Chicago Varnish Company to be correct and complete, his conclusion that the city has no interest in the alley in question, and should, therefore, require no compensation in the ordinance vacating the same, in my opinion, does not necessarily follow.

It will be conceded that the proper municipal authorities

may either accept or reject a dedication, as their judgment suggests.

Littler v. City of Lincoln, 106 Ill., 369.

But, so long as the offer to dedicate remains open and the dedicator does not withdraw it, the city has just as much right to accept as to reject.

According to the contention of counsel for the beneficiary in the matter under consideration, the rule laid down in the case of the *Swedish Evangelical Church v. Jackson*, obtains here. With both this view and conclusion the writer can not agree nor concur. In that case it was said:

“There is no allegation that the public authorities ever accepted the plat of the streets and alleys in question, or that such streets and alleys were ever thrown open to or used by the public. Until acceptance they have no right in the streets and alleys designated on the plat. There is, therefore, no question of public right here involved.”

Swedish Evangelical Church v. Jackson, 229 Ill., 506, on page 510 of opinion; citing:

Hewes v. Village of Crete, 175 Ill., 348.

Jordan v. City of Chenoa, 166 Ill., 530.

Russell v. C. B. & Q. Electric Ry. Co., 205 Ill., 155.

The case from which the above quotation is taken simply considered the right of the city to require an alley that had been closed by an abutting owner to be opened without the city accepting the offer to dedicate the same. The court did not therein pass upon the right of the city to accept the dedication and then require the alley to be opened. It decided that the city had no right in the alley, but it did not determine that the city had no right to have a right in the alley.

There are two kinds of dedication: Common law and statutory. The former leaves the legal title to streets and alleys involved in the dedicator; the latter vests the legal title in the same in the city.

Gosselin v. City of Chicago, 103 Ill., 623.

I assume the matter under consideration comes within the latter.

The purchaser of a lot in a statutory plat acquires no

title to the land of a street or alley there, but only to the land within the actual limits of his lot.

Canal Trustees v. Haven, 11 Ill., 554.

Nor can a statutory offer to dedicate a street or alley be withdrawn except as authorized by statute.

Town of Lake View v. La Bohm, 120 Ill., 92-101.

Accord Hamilton v. C. B. & Q. Ry. Co., 124 Ill., 235-244.

It is pertinent here to inquire the purpose in having the City Council pass an ordinance of vacation in the instance before us. The purpose undoubtedly is that the city may properly abandon its *option* to accept.

Answering your questions, then, categorically, I am of the opinion: First, that the city has never accepted the dedication. Second, that notwithstanding that fact, it still has the *right* to accept. Therefore, the right of the city in and to this alley is the right to accept an offered dedication of it.

The writer trusts that he does not transcend the proper limits of an opinion when he assumes to suggest that, in his opinion, the City Council may very properly view the option it holds as of some financial value. While present conditions do not, perhaps, render it advisable for the city to accept and improve this alley, still, the very near future in our rapidly expanding city may not only change this condition so as to make it desirable but imperatively demand the opening and improvement of an alley at this point or in close proximity thereto; and these, in my opinion, are proper matters to be taken into consideration in disposing of the question, "Shall compensation be asked for this so-called vacation?", which, in fact, is an affirmative rejection of an offer to dedicate.

Yours very truly,

GEO. M. BAGBY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

NOVEMBER 4, 1908.

M. J. DOHERTY, Esq., Superintendent of Streets.

Dear Sir:

Your letter of November 4, on the above subject, addressed to the Corporation Counsel, has, at his direction, been referred to me.

The question is whether or not the Chicago & North-western Railway Company is liable to repair these approaches.

I have read, carefully, the letter of Marvin Hughitt, president of the railway company, addressed to you and dated November 3, 1908, in which he states that he has been advised that the Municipal Court of Chicago held that the company was not liable to repair the pavement of viaduct approaches.

In a case which this Department had before Judge Hume of the Municipal Court, he held that a railroad company was not liable to repair a sidewalk on an approach to a viaduct for the reason that it was not a part of the viaduct. If the court had found as a matter of fact that the sidewalk was a part of the viaduct, his holding would have been that the company was liable to make the repairs. He considered the sidewalk not to be a part of the viaduct, for the reason that it was outside of the retaining walls.

I am of the opinion that the railway company is liable to make the repairs on the viaduct approaches. The principle that railway companies are liable to repair viaducts and approaches thereto was clearly laid down by the Supreme Court of the United States in the case of *Northern Pacific Ry. Company v. State of Minnesota*, decided February 24, 1908, in which the Supreme Court affirmed a decision of the Supreme Court of Minnesota.

State v. Northern Pacific Ry. Company, 98 Minn., 429.
Also:

State v. St. P., M. & M. Railway Co., 98 Minn., 380.

McFarlane v. City of Chicago, 185 Ill., 242.

White v. Inhabitants of Quincy, 97 Mass., 430.

It has been held by our Supreme Court that railway companies are not liable to keep in repair the pavement of a *subway*; but a subway and a viaduct are not the same kind of structure. And in view of the holding of the Supreme Court

of the United States, I feel that our Supreme Court would hold the railway company liable to keep in repair viaducts over their tracks.

In my opinion you should answer Mr. Hughitt's letter, stating to him that the position of the city is that the railway company is liable to make the repairs, and that if the company does not begin to make the repairs at once the city will make them and charge the expense to the railway company.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

NOVEMBER 5, 1908.

E. J. MAGERSTADT, ESQ., City Collector.

Dear Sir:

Replying to your inquiry of the 24th ult., I am directed by the Corporation Counsel to advise you as follows:

(1) That there is no express provision in the ordinance governing the use of automobiles by dealers, but the ordinance was drawn on the theory that only those vehicles which are actually in use upon the streets, avenues or alleys of the city shall be required to have a license. An express provision is made that licenses be granted according to classes, and as long as the owner has a license governing the particular class of the vehicle which he is actually using upon the public highways he has complied with the ordinance. I would suggest in this connection, however, that the dealers make provision to have their license in the machine or in the possession of the chauffeur whenever the car is upon the street.

(2) No provision is made in the ordinance permitting the transfer of licenses. As the license is intended to govern the use of the vehicle, and the actual ownership is immaterial as far as the city is concerned, up to the present time no question has been raised as to transfers. All that the city has required is that the vehicle carry a license.

(3) Wagon licenses are not generally transferable, but

for the reasons stated above no question has been raised up to this time, and in the cases of wagons where the police only look for the tag without requiring the production of the actual license you will readily see it would be difficult for the city to follow up questions of transfer.

(4) No rebates or refunds can be allowed for the unused portion of a license.

(5) I believe the answer to the first question covers this.

(6) The answer to the first question also covers this.

(7) I do not think it would pay to exert our energies for the collection of these fees, because the number must be very small, especially in view of the fact that there are still thousands of vehicles in use in the City of Chicago that have not yet taken out their licenses. There is no reason, however, if the city wanted to enforce a collection, why it could not be done.

(8) If collection was enforced the term could not be apportioned.

(9) Under the present ordinance no provision is made for fractional licenses, unless the owner did not bring his car within the city limits until after the beginning of the license period, in which event the owner pays the proportionate part of the unexpired period; but the fact that he may have taken his car out of the city for two or three months during the middle or after the beginning of the license period is not to be considered, and he is entitled to no rebate or reduction on that account.

(10) The date when application is made is absolutely immaterial. The question for you to determine is the date when the applicant first operated his car upon the streets of the city. If it was at the beginning of the license period, he must pay the full license; if at a later date, he must pay the proportionate fee for the unexpired period. You may select any reasonable method you desire for the purpose of satisfying yourself as to the date when the applicant first used his automobile upon the public highways. If you determine that the production of an affidavit is satisfactory evidence to you, you may *demand* it, but you can not *force the applicant to subscribe to the oath*. If he declines to do so, you must select

some other method. But the applicant is treading upon dangerous ground, for if your investigation at his home or at the garage where he keeps his car should disclose the fact that he had been operating the car for some time previous and had not taken out a license, the proper method for you to pursue would be to institute legal proceedings against him and see that a substantial fine was imposed against him for violating the provisions of the ordinance. You may be assured that in subsequent years you would have no further difficulty with him.

(11) The answer to the tenth question covers this query.

(12) There are no suits pending which should prevent you in any way from collecting fees from all persons operating vehicles of all classes covered by the ordinance upon the highways of the city.

(13) The owners of automobiles are not exempt from paying the vehicle tax by reason of the Illinois Motor Vehicle Law.

Yours very truly,

EMIL C. WETTEN,

First Assistant Corporation Counsel.

NOVEMBER 10, 1908.

W. A. EVANS, M. D., Commissioner of Health.

Dear Sir:

Your letter of November 4, 1908, addressed to the Corporation Counsel, in which you ask whether the rendering of dead animals, either by a person holding a contract for the removal of such animals from the city, or by any one else, can be allowed within the city limits, has been referred to me, and in reply permit me to say:

(1) The last sentence of Section 1092 of the Municipal Code of Chicago of 1905, which section constitutes the authority of the Commissioner of Health to enter into a contract for the removal of dead animals from the streets, avenues, alleys and other public grounds of the city, is as follows:

“Such contract shall provide that such dead animals shall be removed only in closed and covered wagons, vans, drays, or other vehicles, and shall further provide that no

such animal taken up or removed under the provisions of this article be skinned or rendered any place within the city or within three miles of the limits thereof.”

It is clear, therefore, that a public contractor for the removal of dead animals is expressly prohibited from rendering such animals within the city limits or within three miles thereof.

(2) The first paragraph of Section 1210 of Article XX, which article regulates slaughtering and rendering, is as follows:

“It shall be unlawful for any person or corporation within the city, or within one mile of the present or future city limits, to engage in the business of slaughtering animals for food, packing them for market, or cleaning the intestines thereof, or rendering offal, fat, bones or scraps therefrom, or of any dead carcasses or animal matter whatever, or to engage in the manufacture or production of fertilizer or glue therefrom, or the manufacture of the same into fertilizing matter, or changing the form thereof in any manner by the use of heat, steam, fire or chemicals, or otherwise, without previously having obtained a license for such business.”

Section 1215 of the same article is as follows:

“No person shall boil any offal, swill or bones, nor any fat, tallow or lard, except while the same is fresh and otherwise inoffensive, nor shall the business of bone-crushing, bone-boiling, bone-grinding, bone-burning, shell-burning, gut-cleaning, nor the skinning of or making of glue from any dead animal or part thereof, nor the storage or keeping of scrap, fat or grease, or offensive animal matter, be permitted or conducted at any place within the limits of the city, or within one mile thereof, in such a manner as to generate any offensive or deleterious gas, vapor, deposit or exhalation that is dangerous or detrimental to life or health. Every person engaged in the business of boiling or rendering of fat, lard or animal matter, shall cause the scrap or residuum to be so dried or otherwise prepared as effectually to deprive such material of all offensive odors, and to preserve the same entirely inoffensive immediately after the removal thereof

from the receptacles in which the rendering process may be conducted.”

From the above quotations there seems to be a strong implication that the rendering of dead animals not proper for use as food may be carried on if a license is obtained therefor, provided such business is carried on under the limitations and regulations established by said Section 1215. Such implication, however, is overcome and destroyed by Section 1216 of the same article, which is as follows:

“It shall be unlawful for any person or corporation to carry on, establish, prosecute or continue within the city, or within one mile thereof, the occupation, trade or business of skinning or rendering dead animals not proper for use as food; and every such establishment or place of such business existing within the city limits or within one mile thereof, is hereby declared a nuisance, and such trade, occupation or business shall be forthwith abated and discontinued.”

From a consideration of the above sections of the Municipal Code I am of the opinion that the rendering of dead animals not proper for use as food can not be permitted within the city limits or within one mile thereof.

Yours very truly,

CLARENCE N. BOORD,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

NOVEMBER 10, 1908.

JOHN J. HANBERG, ESQ., Commissioner of Public Works.

Dear Sir:

Your letter of November 7 on the above subject, addressed to the Corporation Counsel, has, by his direction, been referred to me. The ordinance granting to the South Side Rapid Transit Railroad Company (the predecessor of the South Side Elevated Railroad Company) provided, among other things, that:

“The said company shall have permission and authority,

and the same are hereby given and granted to it, to construct, maintain and operate within the streets, avenues and alleys or portions thereof, across or alongside which its said elevated railroad is permitted to be constructed as aforesaid, all necessary or proper . . . platforms and other constructions and compliances for ingress and egress and the accommodation of passengers, but so as not to have impaired the usefulness of such streets, avenues, alleys or portions thereof.”

This provision is similar to the provisions concerning platforms in the other elevated railway ordinances. An ordinance of the character granted to the South Side Elevated Railroad Company and all the provisions thereof must be construed strictly against the grantee and in favor of the public. This is particularly true of an ordinance which grants special rights or privileges in a public street.

Snell v. City of Chicago, 133 Ill., 426.

Chicago Terminal R. R. Co. v. Chicago, 203 Ill., 576.

Chicago Terminal Ry. Co. v. Chicago, 220 Ill., 310.

City of Aurora v. Elgin Traction Co., 227 Ill., 485.

Blair v. Chicago, 201 U. S., 400.

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Peters, 420.

The city holds the streets for the use of the public and their free and untrammelled use belongs to the public, that is to say, that the ownership of the city in its streets is but nominal and is subordinate to the public trust for which the title is held.

Snell v. City of Chicago, 133 Ill., 426.

The right of the public in and to a street takes precedence over all the other rights which may have been granted to private grantees, and this right includes, not only the surface of the streets and the sidewalks, but also the earth beneath the surface and the space above.

McCormick v. South Park Commissioners, 150 Ill., 516.

The building, therefore, of the elevated railroad structure in a public street or alley was an invasion of the common right of the public, and if the structure is added to or extended it practically amounts to an extension of the license or fran-

chise of the company. It is in reality a taking from the public of so much of the street as is occupied by the extension, and it is not unlike, in principle, the attempt by a surface railroad to extend its termini or right of way after having once located the same. This can not be done without a new legislative grant.

P. F. W. & C. R. R. Co. v. Reich, 101 Ill., 157.

People v. L. & N. R. R. Co., 120 Ill., 48.

C. D. & V. R. R. Co. v. Chicago, 121 Ill., 176.

The Supreme Court of Illinois, following a decision of the Supreme Court of Georgia, has held that where a municipality grants to a railroad company the privilege to lay one or more tracks upon or across a street the privilege mentioned must be exercised within a reasonable time. If within a reasonable time but one track is constructed the grant will be held to have been exhausted by such construction.

Savannah R. R. Co. v. Woodruff, 86 Ga., 94.

Chicago Terminal Ry. Co. v. Chicago, 220 Ill., 310.

And in the case of the South Side Elevated Railroad Company it might well be held that the original construction of the platform in question has exhausted the grant. The precise question here involved was passed upon by Judge Tuley in *Northwestern Elevated Railroad Company v. City of Chicago*, a case still pending in the Circuit Court of Cook County. In that case the Northwestern Elevated Railroad Company filed a bill to enjoin the city from interfering with the work of extending the length of elevated railroad platforms in the loop. This work had been commenced under a permit from the Commissioner of Public Works, which permit was afterward revoked. It was held that the permit was issued without authority and was properly revoked, and that the Commissioner of Public Works had no authority to grant permits for the extension of elevated railroad platforms over the public streets. Judge Tuley said that in the absence of any express grant of the right to extend the platforms the court must hold that it was not the intention of the City Council to grant to the elevated roads, by their ordinances, the right to make extensions of their platforms.

I have, therefore, to advise you that you have no author-

ity to grant the permit requested. The authority to make the extension asked for can only be obtained by proper action by the City Council.

Yours very truly,
EDWIN H. CASSELS,
Assistant Corporation Counsel.

Approved :
EDWARD J. BRUNDAGE,
Corporation Counsel.

NOVEMBER 18, 1908.

WALTER H. WILSON, Esq., Comptroller.

Dear Sir :

The letter of Mr. Gosselin, dated October 16, calling the attention of the Corporation Counsel to an ordinance passed July 6, 1899, C. P. 1041, granting authority to Pullman's Palace Car Company to construct and maintain a railroad across certain streets, has been referred to me for answer. The question being as to the legality of the term of the ordinance, such language thereof as is considered material in answering this question is quoted herewith :

"Section 1. That permission be and the same is hereby granted to Pullman's Palace Car Company to locate, construct and *forever hereafter* maintain and operate with steam power a railroad consisting of two tracks upon the following route in the City of Chicago . . . said tracks to be laid upon any ground now owned or that may hereafter be owned or acquired by the said Pullman's Palace Car Company upon said route and across all intervening streets and alleys on or along said route."

The apparent absence of decisions in this State on the validity of grants such as this, expressly perpetual in their duration, indicates that they have very seldom been authorized; but the disposition of our courts to restrain a municipality from granting rights in its streets for all time is shown in those cases where grants indefinite or silent as to their duration have been held to be limited to the life of the grantee. To this effect see :

St. Clair County Turnpike Co. v. The People, 82 Ill., 174,

page 178, affirmed in *Turnpike Co. v. Illinois*, 96 U. S. 63. See p. 68.

Snell v. City of Chicago, 133 Ill., 413, page 428.

People v. Central Union Telephone Co., 232 Ill., 260, page 279; and in *Rock Island v. Central Union Telephone Co.*, 132 Ill. App., 248, this language was used:

“The ordinance of 1887 did not limit the period during which appellee could maintain its poles and wires upon the street. That did not make the ordinance *a grant in perpetuity, and therefore invalid*. A grant to a corporation aggregate, limited as to the duration of its existence, without words of perpetuity being annexed to the grant, only creates an estate for the life of the corporation.”

Outside authorities entitled to the highest consideration are not lacking, however, in support of the rule that a municipality vested with only the usual powers to regulate and control the use of its streets can not grant rights thereunder in perpetuity. In the leading case of *Davis v. New York*, 14 N. Y. 506, the following reasons were given for holding void such a grant:

“Taking, therefore, the whole ordinance together and giving effect to it according to its terms and intention, it is no less than an abrogation by the Common Council of their powers and duties over and concerning the public streets and a surrender of a considerable portion of those powers and duties into the hands of private individuals or of a private corporation. This the corporation of New York can not do. Time and experience may, for aught we know, give a very unfavorable solution to the question whether this railroad or any railroad in Broadway can be beneficial to the public, but the hands of the city government will be tied by the contract into which it has entered, and future change and improvement may be prevented by this voluntary surrender of its own powers. On this ground, and without looking at the question in the other and more special aspects, I am satisfied that the ordinance is void and that no effect can or should be given to any of its provisions.”

In *Dillon on Municipal Corporations*, 4th Ed., Sections

715 to 716, the author carefully reviews the above case and declares its reasoning sound.

The then existing authorities, including those just cited, are reviewed in *Detroit v. Detroit City Railway Co.*, 56 Fed., 867, where, at page 876, the opinion by Judge Taft states the following conclusion :

“The right of a city council under its general control of the streets to grant an irrevocable easement for the laying of tracks and running of cars has several times been considered by courts of last resort in this country; and the great weight of authority is in favor of the view that such power does not include authority to convey a vested right in the streets for years or in perpetuity.”

In *Citizen's Street Railway v. Detroit Railway*, 171 U. S., 48, the United States Supreme Court said :

“Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority *explicit permission*, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.”

The last named decision was cited and followed in *Logansport Railway Co. v. Logansport*, 114 Federal, 688.

Further authorities are cited in 28 Cyc. at page 873, on the proposition that “a municipality has no power to grant a perpetual franchise except where such grant is expressly authorized by the Legislature.”

See also :

Elliott on Railroads, 2d Ed., Section 1096L, and cases cited.

Nellis on Street Surface Railroads, page 56.

It is hardly necessary to add that in 1899 the City of Chicago did not have express authority from the Legislature to grant perpetual franchises, and that it did have merely the ordinary powers given to municipal corporations to regulate their streets and prevent their obstruction, so that the fore-

going authorities lead to the conclusion that the passage of the ordinance in question was an *ultra vires* act on the part of the city, and therefore, void.

Yours very truly,

WILLIAM K. OTIS,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

NOVEMBER 18, 1908.

CHARLES M. THOMSON, Esq., Alderman, Twenty-fifth Ward.

Dear Sir:

I am directed to reply to your communication of recent date, addressed to the Corporation Counsel, respecting the legality of an ordinance providing that no motive power other than electricity for operating railway locomotives can be used within the city limits.

I am of the opinion that the city would have no right to order railroad companies to change the motive power for the operation of their locomotives to electricity. The enforcement of such an ordinance would impair the obligation of its contract by attempting to attach new conditions and would be in contravention of the Constitution.

The use of steam, however, as a motive power to propel locomotive engines along the streets can be prohibited in the absence of legislative authority.

North Chicago City Ry. Co. v. Lake View, 105 Ill., 207.

When the use of steam as a motive power in propelling railway locomotives is so attendant with the emission of smoke, soot, cinders, or otherwise injuriously affects the public health, comfort or property so as to amount to a public nuisance, it could be prohibited under the police power of the State.

Harmon v. City of Chicago, 110 Ill., 400.

These results must be clearly demonstrated before such an ordinance could be justified as the reasonable exercise of the police power. If such demonstration can be made legislative authority would afford no protection.

A State can not, by law or contract, surrender or restrict any portion of the sovereignty which it holds in sacred trust for the public weal.

Cyc. of Law, Vol. 28, page 696, and cases cited.

Missouri v. LaClede, 170 U. S., 78.

Chicago v. Nebraska, 170 U. S., 58.

The courts have held that the operation of a steam railroad in a crowded city was not a public nuisance. Yet, in all the cases that I have examined the objection was made to operation of the road and not to the motive power.

I am, therefore, of the opinion: First, that the city has no power to compel the electrification of railroads operating by steam under legislative authority.

Second: That the use of steam as a motive power to propel locomotive engines along the streets can be prohibited when shown to be a public nuisance.

Yours very truly,

ALBERT W. MAY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

NOVEMBER 20, 1908.

BERNARD W. SNOW, Esq., Alderman, Seventh Ward.

Dear Sir:

The Corporation Counsel has directed me to investigate the matter contained in your communication, addressed to him and dated November 16, 1908, and to advise you as to whether or not the City of Chicago has the authority to pass a valid ordinance requiring persons locating business buildings in residence blocks to secure the consent of the majority of the property owners in such block as a condition precedent to the establishment of a business building.

We have, at the present time, no ordinance governing this subject, nor can I find any record of the past existence of such a measure. This condition is easily justified and explained by an investigation of the law thereon. The powers of the City Council of the City of Chicago are defined

and limited by the City Charter (Cities, Villages and Towns Act), and, of course, the Council has not the power to exceed its charter limitations.

In the aforesaid act may be found a number of provisions relating to the construction and location of certain classes of buildings, among them, buildings used for packing houses, renderies, tallow chandleries, bone factories, soap factories, tanneries, breweries, distilleries, livery stables, blacksmith shops and factories, and pursuant to the power to regulate the location of such establishments or buildings the City Council in a number of incidents has required the securing of frontage consents as a condition precedent to the construction of such buildings and establishments.

In every instance in which a frontage consent ordinance has been sustained the right to regulate the location or maintenance of the particular kind of building or establishment has been specially delegated to the city by the State Legislature.

An ordinance requiring frontage consents to erect slaughter houses was upheld in:

Harminson v. City of Lewiston, 153 Ill., 313.

Livery stables:

City of Chicago v. Stratton, et al., 162 Ill., 494.

Gas tanks:

Standard Oil Co. v. City of Danville, 199 Ill., 50.

Wooden buildings within fire limits:

Patterson v. Johnson, 214 Ill., 481-488.

The City Charter nowhere contains any provisions relating to the location of business buildings, and as a business building, in itself, can not correctly be said to amount to or constitute a nuisance, I am of the opinion that the City Council has no authority to pass an ordinance requiring frontage consents to be secured prior to the erection of such building.

Inasmuch as an ordinance founded upon the charter power must be reasonable in order to be valid, even though the city had express or general power to pass such an ordinance as the one in question, I have grave doubts whether the ordinance could be sustained as being reasonable, even

though I appreciate the position taken by Mr. Poague in his communication to you.

I, therefore, advise you that under the present condition of the City Charter, nothing can be done to deprive the owner of property of constructing thereon a business building, provided he complies with the building regulations of the City of Chicago.

Yours very truly,
 HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

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NOVEMBER 20, 1908.

THOMAS G. PIHLFELDT, Esq., City Bridge Engineer.

Dear Sir:

I am directed to reply to your communication of recent date addressed to the Corporation Counsel, asking to be advised as to whether any obligation rests upon the City of Chicago to remove pile stumps left in the Chicago river by the Sanitary District at the time of the removal of the old Dearborn street bridge.

Any obstruction placed in a navigable stream which interferes with navigation is a common nuisance.

McLean v. Mathews, 7 Ill. App., 599.

The duty to abate a nuisance primarily rests upon the party creating same. If the stumps were left in the channel by the Sanitary District at the time of the construction of the bridge the duty of removing same falls on the Sanitary District and necessarily at its expense.

Section 71 of Art. V of the Cities and Villages Act provides that the city or village government shall have jurisdiction upon all waters within or bordering upon the same to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the State.

Section 969 of the Revised Municipal Code passed under authority of above act includes the Chicago river and its branches as part of the Chicago Harbor and gives control of

the harbor to the Harbor Master under the supervision and according to the direction of the Commissioner of Public Works.

The Commissioner of Public Works is the proper party to remove obstructions from the Chicago river whenever they exist.

McLean v. Mathews, supra.

Any unlawful obstruction can be removed at the expense of the person whose duty it was to effect the removal.

Hawley v. Harrall, 19 Conn., 142.

Sioux City v. Weare, 59 Iowa, 102.

I am, therefore, of the opinion that the duty to remove the obstruction rests upon the Sanitary District.

Second, that if the Sanitary District shall refuse to remove said obstruction upon request by the City of Chicago and after the expiration of reasonable notice, the duty then falls on the Commissioner of Public Works to remove same at the expense of the Sanitary District. This work should be done under the direction and subject to the approval of the War Department.

Yours very truly,

ALBERT W. MAY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

NOVEMBER 25, 1908.

PATRICK J. NOLAN, Esq., Alderman, Thirty-fourth Ward.

Dear Sir:

In reply to your verbal request for an ordinance regulating fruit stores and ice-cream parlors, I beg to hand you herewith draft of an ordinance which is intended to meet your ideas on the subject, and which it is believed goes as far as the City Council lawfully can go in controlling such places.

You will recall that a previous attempt has been made to regulate retail fruit stores and ice-cream parlors by requiring the proprietors to take out licenses. The validity of this ordinance as attacked in the case of *Georgepolos et al. v.*

The City, Superior Court, Gen. No. 254,061, in which about 160 dealers asked for an injunction restraining the enforcement of the ordinance. A final decree was entered November 30, 1906, by Judge McEwen, granting the injunction as prayed.

In his decision Judge McEwen recognized the power of the city to regulate places where it is dangerous and improper for children to congregate, but expressed the opinion that the ordinance in question could not be sustained, since the operation of the ordinance had no direct relation to the evil sought to be remedied. He said:

“It is not the selling of fruit, it is not the selling of ice cream, that brings about the evil complained of and sought to be prevented. If it is the selling of fruit, the selling of ice cream, then everybody that engages in the occupation should pay a license. But the ordinance does not seek to do that — does not seek to compel that. The real evil lies in the fact that a place is furnished where the young may congregate without proper supervision and restriction. . . . It is the opportunity that is the real underlying cause of the evil. To cut off that opportunity, I have no doubt that the city has power; but I do not believe that it can do it by an ordinance which simply requires a retail fruit dealer or a retail ice-cream dealer to take out a license.”

This idea is more clearly expressed by the Supreme Court in *City of Chicago v. Netcher*, 183 Ill., 104, where it was said, page 111:

“In order to sustain legislative interference with the business of the citizen by virtue of the police power it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends, in some degree, toward the prevention of offenses or the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose.”

Obviously, the most effective means of regulating an evil

of this kind would be to provide for the licensing of places where children are subject to immoral influences. Then, in case of misbehavior or violation of the ordinance, the license might be revoked and the place closed. The difficulty, however, in imposing a license fee under the present circumstances lies in the fact that the business of selling fruit and ice cream is not bad *per se*; there are no harmful or immoral results from the sale itself. It is merely a coincidence that the retail fruit and ice-cream business seems to be carried on largely by a set of men who, entirely apart from and without reference to the nature of their business, are vicious and criminal in their impulses and likely to inflict wrongs on children.

If the city had special authority from the Legislature to license such places, this question would not have to be considered. In the absence, however, of such express power, the city can impose license fees only under the general police power and its police regulations must, as already pointed out, have a real and substantial relation to the objects sought to be accomplished.

The subject of licenses as a means of regulating objectionable trades or businesses is discussed in *Besette v. The People*, 193 Ill., 334, where, on page 343, the court said:

“The general rule is, that a license fee will not be exacted for the purpose of regulating any trade, calling or occupation, unless there is something in the nature of such trade, calling or occupation, or in the circumstances surrounding it, which calls for the exercise by the State of its police power.”

For these reasons it is believed that Judge McEwen was right in his decision involving the ordinance previously passed, and that no license can be required from retail fruit and ice-cream dealers. Accordingly, the ordinance suggested herewith simply contains a prohibition against private rooms or compartments similar to that existing against wine rooms in saloons, and also prohibits the presence of children in the places specified after 9 o'clock P.M. In other words, the ordinance seeks to enumerate the places where children are likely to congregate and undertakes to prohibit the conditions under which the opportunity is offered to do wrong. A heavy

penalty is also imposed for violation of the provisions of the ordinance. I think that is the extent of the city's power as the law now stands.

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,
First Assistant Corporation Counsel.

NOVEMBER 28, 1908.

WALTER H. WILSON, Esq., Comptroller.

Dear Sir:

In a communication to this office, approved by you, Joseph F. Peacock, City Real Estate Agent, inquires as to the "legal consequence which will follow upon the vacation of the alleys in Block 14" in Mont Clare, a subdivision of the north half of the northwest quarter of Section 31, Township 40 North, Range 13, East of the Third Principal Meridian. I beg leave to advise you that the legal consequences of a vacation are determined by the character of the dedication. There are two kinds of dedication: common law and statutory. The former leaves the legal title to the alleys involved in the dedication; the latter vests the legal title to the same in the city.

Gosselin v. City of Chicago, 103 Ill., 623.

The facts here presented show that a plat of the subdivision of Mont Clare, with the necessary legal concomitants, was recorded January 10, 1874, as Document No. 141,545, wherein the reservations since used as the alleys in question are shown. There are no restrictions, however, upon the use to which the indicated reservations may be put, and where this is true, the city has the legal right to put them to such reasonable public use as the judgment of its proper authorities may decide upon: the exercise of their discretion, as to use, being limited only to a reasonable public use.

Riverside v. MacLain, 210 Ill., 308.

The alleys in question lie on either side of the right of way of the Chicago, Milwaukee & St. Paul Railroad. On

November 20, 1907, one of the original dedicators conveyed, as widow, by warranty deed, all the said Block 14 to the City of Chicago, except the right of way of the Chicago, Milwaukee & St. Paul Railroad.

The contemplated vacation is proposed, no doubt, in the belief that the land now occupied by these alleys would be, *ipso facto*, legally merged in and become a part of the park, the territory of which is now divided by them.

The deed to the city of the entire remaining portion of Block 14, could not, in law, affect the title in and to the land in the alleys, for the reason that prior to its execution and delivery there was an accepted statutory dedication of them. By virtue of this statutory dedication the fee in the alleys passed to the city.

Canal Trustees v. Havens, 11 Ill., 554.

Hunter v. Middleton, 13 Ill., 50.

St. John v. Quitzow, 72 Ill., 334, 336.

Gebhardt v. Reeves, 75 Ill., 301, 304.

M. & H. Zinc Co. v. La Salle, 117 Ill., 411, 414, 417.

The deed of Mary E. Allen to the city places the latter in the same position as the purchaser of a lot abutting upon these alleys, and it has been held that the purchaser of a lot in a statutory plat acquires no title to the land of the alley there, but only to the land within the actual limits of his lot.

Canal Trustees v. Havens, 11 Ill., 554.

With this phase of the question, however, the city was not concerned, for the reason that it held title in fee to the alley at the time by virtue of the statutory dedication.

Canal Trustees v. Havens, 11 Ill., 554.

Hunter v. Middleton, 13 Ill., 50.

St. John v. Quitzow, 72 Ill., 334.

But Kales on Future Interests, at page 2, Section 2, Chapter 1, Part I, entitled, "Conditional Estates," under the caption "The Interest of the Dedicator Upon a Statutory Dedication," says:

"Upon a statutory dedication the fee simple estate in the land dedicated passes to the municipality. It is admitted on all hands, however, that should the dedication be vacated

there is some right in the original dedicator to recover back the lands dedicated."

Hunter v. Middleton, 13 Ill., 50.

St. John v. Quitzow, 72 Ill., 334-336.

Gebhardt v. Reeves, 75 Ill., 301, 306.

Helm v. Webster, 85 Ill., 116, 118.

Village of Hyde Park v. Borden, 94 Ill., 26, 34.

M. & H. Zinc Co. v. City of La Salle, 117 Ill., 411.

This right, however, depends upon the conditions, if any, of the dedication and the use, in so far as it is public or private, to which it is put. If there be no restrictions as to its use, it is subject to any reasonable public use.

In *Helm v. Webster*, 85 Ill., 116, the intent of the dedicator was fully expressed in the following language:

"It is hereby provided and understood that, when said premises shall, after being opened as a street, cease to be used as such, or whenever such street as may be opened upon said premises shall be abandoned or vacated by said city, the same shall revert to the present owners thereof, their heirs or assigns, the same as though this deed had never been made."

This appears to be a condition subsequent, upon the breach of which the dedicator would have a right of entry. And, again, in the case of *St. John v. Quitzow*, 72 Ill., 334, on page 336, the court says:

"The new streets were dedicated upon condition the fee in the streets and alleys vacated should vest in appellant (the original dedicator)."

In *M. & H. Zinc Co. v. City of La Salle*, *supra*, Justice Schofield says:

"The adjacent lot owner (referring to the original dedicator) does not have a reversion, but a possibility of reverter only."

In the latter case the court was contrasting a reversion with a possibility of reverter and not a possibility of reverter with a right of entry for a breach of the condition subsequent.

Kales' Future Interests, Chapter 1, page 3, Sec. 2.

The Supreme Court of Illinois has apparently never passed upon a case which actually involved the question of the nature of the dedicator's interest, and you will observe

from the quotations above that the expressions concerning it, so far as they go, have not greatly tended to clarify it.

The writer is of the opinion, that such interest as the dedicator may have, if any, upon the vacation of a statutory dedication, depends upon the conditions, if any, recited in the deed or certificate and the character of the changed use to which the city puts the land dedicated. If the dedication be an unrestricted one, as to use, the city may make any reasonable public use of it the proper authorities see fit. Our Supreme Court has said:

“A distinction is to be made between cases where a public square is dedicated without *restriction* and cases where the dedication is restricted to a particular purpose. In the *former case any reasonable public use may be made of the square*, etc.”

The Village of Riverside v. MacLain, 210 Ill., 327.

The facts in the case now under consideration show the dedication to have been an unrestricted one. I am, therefore, of the opinion, that the city has the legal right to vacate the alleys in question, as such, without any legal consequence attaching different from that which now obtains; provided, however, it puts the land in question to a reasonable public use. Under such circumstances the city will still be vested with the fee.

Yours very truly,

GEO. M. BAGBY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 7, 1908.

F. T. F. SCULLY, Esq., Alderman, Tenth Ward.

Dear Sir:

I am directed by the Corporation Counsel to reply to communication of Tenth Ward Taxpayers' Association, upon the subject of the legality of the proposed new technical high school at Harrison street.

Section 1, Article VIII of the Constitution of the State of Illinois declares "that the General Assembly shall provide a thorough and efficient system of free schools whereby all children of this State may receive a good common-school education."

In construing this clause of the Constitution, our Supreme Court, in the case of *Richards v. Raymond*, 92 Ill., 612, uses the following language:

"While the Constitution has not defined what a good common-school education is, and has failed to prescribe a limit, it is no part of the duty of the courts of the State to declare by judicial construction what particular branches of study shall constitute a common-school education. That may be, and doubtless is, a proper question for the determination of the Legislature."

In the same case, the court holds that a high school for the education of more advanced pupils is a school of the character required by the Constitution.

In pursuance of above Charter provision, the Legislature has enacted laws providing that every school established under the provisions of this act shall be for instruction in the branches of education prescribed in the qualification for teachers.

Section 189, Chapter 122, Hurd's Revised Statutes.

Section 187 of the act provides that teachers shall be qualified to teach orthography, reading in English, penmanship, arithmetic, English grammar, modern geography, civics, the elements of natural sciences, history of the United States, history of Illinois, physiology and laws of health.

The constitutionality of above act is sustained in the case of *Powel v. Board of Education*, 97 Ill., 375.

In 1897 an act was passed by the Legislature authorizing the establishment and maintenance of manual training departments for high schools.

Section 424, Chapter 122, Hurd's Revised Statutes.

I am informed that no subject of education will be taught in the school in question that is not embraced in the above acts of the Legislature.

I am, therefore, of the opinion, that the Board of Education will not in any manner exceed its statutory power in the establishment and maintenance of the school in question.

Yours very truly,

ALBERT W. MAY,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 7, 1908.

PAUL P. BIRD, Esq., Smoke Inspector.

Dear Sir:

At the direction of the Corporation Counsel, I have carefully considered the questions submitted in your letter of November 6, relative to the emission of dense smoke by the heating plants of the public schools.

The Board of Education of the City of Chicago partakes of the nature both of a branch or department of the municipal government and of an agency of the State for the purpose of providing and administering a system of free schools.

People v. Healy, 231 Ill., 629.

Brenan v. The People, 176 Ill., 620.

McGurn v. Board of Education, 133 Ill., 122.

Fuller v. Heath, 89 Ill., 296.

The men who are in charge of the heating plants of the public schools are, for most purposes, however, to be considered employees of the city. They are examined and their names are certified to the Board of Education by the Civil Service Commission of the City of Chicago. Being essentially *employees* appointed in the same way as are most other employees of the city, I am of the opinion that they can not be said to be "operating or in charge of" the buildings within the meaning of those words as used in the ordinance. The Board of Education is really in charge of the public school buildings in the City of Chicago.

If we consider the Board of Education as a branch of the municipal government, the city in instituting a suit against the Board for violation of the smoke ordinance would be in

the position of suing itself. This can not be done. If we consider the Board of Education as an agency of the State, the city is in no better position, because the rule of law is that a city can not successfully maintain against the State a suit for the violation of a municipal police ordinance. This is the holding in a recent well-considered decision of the Supreme Court of Kentucky.

Kentucky Institute, etc., v. Louisville, 97 S. W., 402; 8 L. R. A. (N. S.), 553.

In case a civil service employee of the Board of Education is incompetent or neglects his duty, charges preferred against him are heard, not by the Civil Service Commission, but by the Trial Committee of the Board of Education, under the provision of the Teachers and Employees Pension Act of June 21, 1895.

Brenan v. The People, 176 Ill., 620.

I am, therefore, of the opinion that the only practical method in which you can proceed in cases of violations of the smoke ordinance at a public school building is to secure the name of the engineer in charge and prefer charges against him before the Board of Education.

Yours very truly,

EDWIN H. CASSELS,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

DECEMBER 10, 1908.

WINFIELD P. DUNN, ESQ., Chairman, License Committee.

Dear Sir:

Your committee referred to the Corporation Counsel for an opinion as to its validity an ordinance licensing and regulating ice-cream factories, which was referred to your committee by the City Council June 29, 1908.

I have carefully considered the provisions of the above-mentioned ordinance, and, for the following reasons, it is now my opinion that the ordinance is susceptible to legal objections.

The City of Chicago is governed by its charter which became a law on July 1, 1872. Under the authority delegated thereunder by the Legislature to the various cities, the City Council has the authority "to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." (Cities and Villages Act, Par. 63, Sec. 68). The city also is authorized "to regulate the police of the city or village and pass and enforce all necessary and police ordinances." (Cities and Villages Act, Par. 63, Sec. 66.)

So far as the aforesaid powers authorize enactments concerning ice-cream factories, there is no doubt but that the City Council during the years between July 1, 1872, and July 1, 1907, might have legally enacted an ice-cream ordinance. On the last mentioned date, however, the Legislature of this State passed a law governing the inspection of butterine and ice-cream factories. The statute includes a detailed and comprehensive scheme for the inspection of such factories, and provides for the issuance of a certificate in case the factory is found to be constructed and conducted according to the provisions of the statute.

During recent years the City of Chicago attempted to enact ordinances covering the same subject matter as has been dealt with by the State Legislature.

In the case of *Wilkie v. City of Chicago*, 188 Ill., 445, the city attempted to enforce an ordinance which provided for a license fee of thirty dollars from all plumbers engaged in business in the City of Chicago, notwithstanding the fact that a statute, which provided for a complete scheme of supervision of plumbers and their work, was enacted subsequent to the passage of the ordinance.

The court, in declaring the ordinance to be invalid, used the following language.

"The power to regulate such a business and to grant a license therefor resides in the Legislature, which may grant a license directly or confer the right upon a city. While the Legislature may delegate the power to municipalities to grant a license for a particular occupation and to exact a license

fee, they may, at the same time, take away such power or resume the exercise of it themselves."

In the case of *City of Chicago v. Burke*, 226 Ill., 191, among other points considered by the court, was the effect of the statute relating to oil inspection on an ordinance passed by virtue of the authority delegated by the Legislature to the city by the Cities and Villages Act, and it was therein repeated that "If the Legislature delegated a power they may resume it, and in that way deprive municipalities of the right to exercise it." "Whatever power was given to the city by the General Incorporation Act for the inspection of oil was taken away when the Legislature resumed control of the subject by the Act of 1874; the City of Chicago, therefore, had no authority to legislate on the subject."

It therefore seems clear that any authority that the City Council had by virtue of the above quoted provisions of the city charter, under which the city might at one time have passed the ordinance in question, has been taken away from the city by the enactment of the law relating to butterine and ice-cream factories. I am, therefore, obliged, in view of this conclusion, to inform your committee that it is a matter of grave doubt as to whether or not such an ordinance as the one considered in this opinion would be considered constitutional by our courts.

Yours very truly,
HOWARD W. HAYES,
Assistant Corporation Counsel.

Approved:
EMIL C. WETTEN,
First Assistant Corporation Counsel.

DECEMBER 12, 1908.

NICHOLAS R. FINN, ESQ., Chairman, Subcommittee of Finance Committee.

Dear Sir:

Replying to your request for an opinion as to the liability of the city with reference to certain claims for damages arising out of break in the water main at Harrison and Canal streets on July 4, 1908, would state that I have made an

investigation of this matter and find the facts to be about as follows:

On July 4, 1908, there was a break in a 36-inch water main at Harrison street, about 100 feet west of Canal street. The break occurred about 3:20 A.M. On notice being received at the First District Station, steps were immediately taken to shut down the valves controlling this main, a complete shut down being made at 8 A.M. of the same day. Repairs were made and the water turned on again at 2 A.M. July 5.

The records of the Water Department show this main to have been laid in 1880. The pipes composing the main appear to have been of excellent quality and the fracture a clean one. Nothing has developed which would show the cause of this break and no explanation can be offered to account for it.

The owning of water works and the furnishing of water by a municipal corporation to its inhabitants for profit is an undertaking of a purely private nature. The duties exacted of a municipality under such circumstances are the same and the liabilities imposed upon it are the same as those imposed in case of private corporations or individuals who are engaged in a similar enterprise. They are bound to exercise due care and skill in constructing and maintaining mains for the distribution of water, but they are not insurers of the safe condition of property and consequently are not liable for injuries that could not have been prevented by the exercise of due care and vigilance. The negligence in such cases might be said to be the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or do something which a prudent and reasonable man would not do.

In *Terry v. The Mayor, etc., of New York*, 8th Bosworth, 510, the court in referring to a case in point said:

“No one is responsible for injury committed by their breaking unless caused by negligence or design. If all due diligence is used in making or maintaining the pipes, the injury becomes an unavoidable accident for which no one is responsible. There is no evidence that the pipes were originally defective and as they were in long before the dam-

age in this particular matter, they must have been originally strong.”

And the court in the same case further says:

“If the pipes were originally sound there was no proof of want of care in repairing any known defects or discovering them. Neglect is not to be presumed any more than fraud, except in cases where the policy of the law places the burden of disproving it upon the party.”

See also *Blythe v. Birmingham Water Co.*, 11 Exchequer, 781.

In the case of *Selz, Schwab & Co., v. The City of Chicago*, 202 Ill., 549, the court said:

“There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible and if there were any facts showing the necessity or propriety of such an inspection they should have been alleged.”

A careful examination of the authorities discloses no dissenting opinion from the doctrine announced in above cases, and as there was no negligence on the part of the city or its employees in the original construction of the main, nor was there any negligence on its part either in its maintenance in making repairs or otherwise, I am of opinion that the city is not liable.

Yours very truly,

FRANKLIN A. DENISON,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

DECEMBER 14, 1908.

B. W. SNOW, Esq., Chairman, Committee on Compensation.

Dear Sir:

Your request for an opinion as to whether the Illinois Central Railroad Company can be compelled to construct a

subway under its tracks at Sixty-ninth street, has been referred to me.

The "O'Neill Ordinance," passed May 23, 1892, requiring the Illinois Central Railroad Company to raise its roadbed and construct the necessary subways, extended to Sixty-seventh street. A subsequent ordinance was passed on September 29, 1902, requiring the Illinois Central Railroad Company, together with certain other railroad companies, to elevate the plane of its railway tracks within the City of Chicago.

Paragraph 1 of Section 1 of the ordinance of September 29, 1902, provided that the Illinois Central Railroad Company should commence the elevation of its roadbeds and tracks at a point about on the south line of Sixty-seventh street and provided the gradient or gradients to be used in the elevation of said tracks until the same should reach a point fifty feet south of the south line of Seventy-ninth street.

Paragraph 1 of Section 4 of this ordinance provides that certain subways shall be constructed beneath the tracks of the Illinois Central Railroad Company where the tracks are intersected and crossed by certain streets designated therein. No mention is made in the enumeration set forth in this section of the construction of a subway at Sixty-ninth street, in fact the ordinance is silent as to Sixty-ninth street.

Section 13 of the ordinance of September 29, 1902, provides in part as follows:

"In consideration of the acceptance of this ordinance by said railway and railroad companies, the city undertakes and agrees that it will not hereafter require or attempt to compel said railway or railroad companies, at their expense, to build any additional or other subways than those in this ordinance provided for between the following points: Sixty-seventh street and Seventy-ninth street on the Illinois Central Railroad," etc.

"An obligation to keep up a crossing, imposed as a condition of the right to cross a highway, must be regarded as necessarily attaching to whatever person or corporation may be the owner of the road as long as the right is exercised. It

is a continuing condition inseparable from the enjoyment of the franchise.”

People ex rel. City of Bloomington v. C. & A. R. R. Co., 67 Ill., 118.

“It was not within the power of the city to contract that it would not exercise the authority given it by the statutes, nor to contract that it would not perform the duty imposed upon it by law.”

C. B. & Q. v. City of Quincy, 136 Ill., 563.

It will be observed that:

“The Legislature intended to provide against any obstruction of the safe and convenient use of the highway, for all time; and if, by the increase of population in the neighborhood, or by an increasing use of the highway, the crossing which at the outset was adequate is no longer so, it is the duty of the railroad corporation to make such alteration as will meet the present needs of the public who have occasion to use the highway.”

C. B. & Q. v. Drainage Commissioners, 200 U. S., 590.

In *Lake Erie & Western Railroad Company v. Cluggish*, 143 Ind., 347, the court said, quoting from *Lake Erie & Western Railroad Company v. Smith*, 61 Fed. Rep., 885:

“The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty, and if by the increase of population or other causes the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public.”

So, in *State of Indiana v. Lake Erie & Western Railroad Company*, 83 Fed. Rep., 284-7, which was the case of an overhead crossing lawfully constructed on one of the streets of the city, the court said:

“If by the growth of population or otherwise the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not necessarily impair the usefulness of the highway.”

To the same effect see also:

State ex rel. City of Minneapolis v. St. Paul, Minn. & Manitoba Ry. Co., 98 Minn., 380.

Northern Pacific R. R. Co. v. State of Minn. ex rel. City of Duluth, 208 U. S., 583.

From a careful study of the cases above cited, we are of the opinion that the city can require the Illinois Central Railroad Company to construct a subway at Sixty-ninth street, notwithstanding the ordinance above cited.

Yours very truly,

FRANKLIN A. DENISON,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

DECEMBER 14, 1908.

MICHAEL ZIMMER, Esq., Chairman Committee on Schools.

Dear Sir:

I am directed by the Corporation Counsel to reply to your request for an opinion of title to the property known as the Gage Farm. The legal description of said property is as follows, to-wit: The northeast quarter of Section 25, Township 39 North, Range 12, East of the Third Principal Meridian, and Lot 1 on the Partition by the Circuit Court of Cook County, Illinois, of the west part of the northwest quarter and the west part of the southwest quarter of Section 30, Township 39 North, Range 13, East of the Third Principal Meridian in Cook County, Illinois.

OPINION OF TITLE

TO

THE NORTHEAST QUARTER OF SECTION 25, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN.

I have examined abstracts consisting of:

1. Government to February 11, 1881.
2. From date last mentioned to May 22, 1893.
3. From date last mentioned to May 24, 1906.

Have also examined record of titles in office of Recorder

of Deeds of Cook County, Illinois, and from said examination find title to premises in question in the City of Chicago subject to the following:

1. Right of way of Chicago, Madison & Northern Railroad Company.
2. Right of way of Suburban Railroad Company.
3. Right of way of Riverside and Harlem Railroad Company.
4. Right of way of Illinois Central Railroad as assignee of above franchises.

FORFEITURES.

Forfeiture of August 12, 1879, at sale commenced July 21, 1879, for nonpayment of State, county, etc., taxes of the years 1872, 1873, 1874, 1875, 1876, 1877 and 1878, amounting to \$2,636.75, shown as note 42, part 1 of abstract. Judgment was refused at July term 1881 of County Court for taxes of 1872 to 1880, inclusive. Same were extended on warrant of 1880. City paid \$2,748.75, balance of \$522.65 remains unpaid, shown as Note 10, part 2 of abstract.

5. Forfeiture of September 16, 1880, at sale commenced September 13, 1880, for nonpayment of State, county, etc., taxes for 1879, amounting to \$316.55, shown as Note 43, part 1 of said abstract.

6. Judgment was refused for State, county, etc., taxes of 1881, amounting to \$426.24; of 1882, amounting to \$308.70; of 1883, amounting to \$336.93; of 1884, amounting to \$342.45; of 1886, amounting to \$430.76. Same remain unpaid. Shown as notes 11 to 15, part 2 of abstract.

7. On August 25, 1888, above property was sold to city for \$604.49, at sale commenced August 20, 1888, for State, county, etc., taxes. Shown as note 16, part 2 of said abstract.

8. Rights of Chicago Telephone Company to erect and maintain poles and wires.

9. Rights of receiver appointed in cause of Chicago Title & Trust Company v. Suburban Railroad Company and relating to franchise of Suburban Railroad Co.

10. Bill for accounting filed August 15, 1905, by Annie G. Evans, Louise H. Symonds and Clara Gage Clark against

City of Chicago, claiming express trust by virtue of trust deed executed by David A. Gage, a defaulting treasurer of the City of Chicago.

OPINION OF TITLE
TO

LOT 1 IN THE PARTITION BY THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, OF THE WEST PART OF THE NORTHWEST QUARTER AND THE WEST PART OF THE SOUTHWEST QUARTER OF SECTION 30, TOWNSHIP 39 NORTH, RANGE 13, EAST OF THE THIRD PRINCIPAL MERIDIAN IN COOK COUNTY, ILLINOIS.

I have examined abstract consisting of:

1. From Government to February 11, 1881, by Handy & Co.

2. From date last mentioned to May 22, 1893, by Title Guaranty & Trust Company.

3. From date last mentioned to February 27, 1894, by Title Guaranty & Trust Company.

4. From date last mentioned to May 24, 1906, by Chicago Title & Trust Company, and have examined Record of Titles in Recorder's Office of Cook County, Illinois, from date last mentioned, and from said examination find title to property in question in City of Chicago subject to the following:

1. Quit claim deed dated February 13, 1869, recorded March 30, 1869, in Book 511 of Records, page 276, from John Forsythe to Mary M. Barkalow. Objection can be disregarded for the reason that Forsythe obtained title through tax deed and City of Chicago thereafter, to-wit, July 10, 1880, obtained tax deed to same premises. Recorded in Book 1002 of Records, page 448, instrument 51, part 1 of abstract. Instrument 54, part 1 of abstract.

2. Tax sale November 28, 1842. No deed issued. Shown as note 59, part 1 of abstract.

3. Tax sale September 18, 1843. No deed issued. Shown as Note 60, part 1 of abstract.

4. Tax sale September 11, 1850. No deed issued. Shown as Note 61, part 1 of abstract.

5. Tax sale September 11, 1851. No deed issued. Shown as Note 62, part 1 of abstract.

FORFEITURES.

6. Forfeiture to State under sale of September 28, 1874, amounting to \$120.75. Amount not extended and remains unpaid. Shown as Note 63, part 1.

7. Forfeiture of October 15, 1874, amounting to \$6.07, sale of September 28, 1874. Amount not extended, remains unpaid. Shown as Note 64, part 1 of abstract.

8. Forfeiture of August 5, 1879, sale of July 21, 1879, amounting to \$2,576.07, for taxes of 1874 to 1878, inclusive. Shown as Note 65, part 1 of abstract. Judgment refused on taxes for years 1873 to 1880. City paid \$2,310.27, balance of \$817.27 remains unpaid.

9. Forfeiture of August 25, 1879, sale July 21, 1879, amounting to \$111.88. Amount not extended, remains unpaid. Shown as Note 66, part 1 of abstract.

10. Forfeiture of September 23, 1880, sale of September 13, 1880, amounting to \$310.45. Shown as Note 68, part 1 of abstract.

11. Forfeiture of September 23, 1880. Sale of September 13, 1880, amounting to \$9.15. Shown as Note 68, part 1 of abstract.

12. Argument and plat laying out Riverside boulevard. Shown as instruments 13 and 14, part 2 of said abstract.

13. Quit claim deed from city to John S. Huey and Charles F. White to that portion of said Lot 1 lying south of the center line of Riverside boulevard shown as Instrument 16, part 2 of said abstract.

14. Taxes of 1882, amounting to \$732.55; of 1883, amounting to \$467.71; of 1885, amounting to \$430.82, and of 1887, amounting to \$294.75, remain unpaid. Shown as memoranda 22, 23, 24 and 25, part 2 of said abstract. Above property was sold to city for State and county taxes September 7, 1888. Amount of sale, \$375.05; Note 26, part 2 of abstract.

15. Special assessments for a main out fall sewer, Cicero No. 251, amounting to \$1,508 and \$40. Confirmed June 12, 1891. First installment of \$40 assessment paid. Special assessment for brick sewer confirmed July 16, 1892, amounting to \$64. Shown as 27 and 28 of part 2 of said abstract.

16. Right of way of Chicago, Madison & Northern Railroad Co., as shown in Instrument 12, part 2 of said abstract.

17. Right of way of The Suburban Railroad Company and right of way of Chicago, Madison & Northern Railroad Company, occupied by Illinois Central Railroad Company, as shown in Instrument 4, part 4 of said abstract.

18. Dower in husband of Cyntha Poylson, if married on August 9, 1836. Shown as Instrument 3, part 1 of said abstract. May be disregarded because of old age of said husband, if living.

19. Dower in wife of John B. Barry, if married on February 12, 1838. Shown as Instruments 4 and 8, part 1 of said abstract. May be disregarded because of old age of said wife of John B. Barry, if living.

20. Dower in husband of Hannah Hurlburt, if married on December 22, 1836. Shown as Instrument 5, part 1 of said abstract. May be disregarded because of old age of said husband of Hannah Hurlburt, if living.

21. Subject to rights of Chicago Telephone Company to erect and maintain poles and wires.

22. Right of way of Riverside & Harlem Railroad Company.

23. Subject to rights of Receiver appointed in cause of Chicago Title & Trust Company v. Suburban Railroad Company and relating to franchise of Suburban Railroad Company.

24. Bill for accounting filed August 15, 1906, by Annie G. Evans, Louise H. Symonds and Clara Gage Clark against the City of Chicago, claiming a resulting trust by virtue of trust deed executed by David A. Gage, a defaulting treasurer of the City of Chicago.

Complainants in aforementioned suit of Annie G. Evans,

et al., claim interest in premises in question as heirs at law of David A. and Eliza M. Gage, and as purchasers from the assignee in bankruptcy of David A. Gage.

In 1873 David A. Gage executed a trust deed conveying aforesaid premises to one George Taylor, trustee, for the purpose of securing the City of Chicago from loss on account of indebtedness of said Gage as defaulting treasurer of the City of Chicago. Subsequently by decree of court the said property was sold to the City of Chicago, the decree providing that the city might purchase at said sale. In this suit both David A. Gage and Eliza M. Gage, his wife, were made parties. In 1878 David A. Gage was adjudged a bankrupt and one Mason B. Carpenter, assignee in bankruptcy, sold at assignee's sale to one Alexis M. Lay said interest of said David A. Gage in said trust estate.

Claimants allege that in the year 1889 David A. Gage died, leaving complainants as his only heirs, and that in 1894 Eliza M. Gage died, leaving complainants as her only heirs at law, and that they purchased the interest of said Lay, so acquired by said assignee's sale. It appears, however, that in 1881 said Alexis M. Lay and Anna F. Lay, his wife, executed quit claim deed of above premises to the City of Chicago. Shown as Instrument 8, part 2 of said abstract. The interests of said complainants as heirs at law of David A. Gage and Eliza M. Gage are concluded by the suit in which said David A. Gage and Eliza M. Gage, his wife, were made parties and in which the decree of sale of said premises provided that the City of Chicago may become a purchaser.

The above facts coupled with the *laches* of complainants, and the fact that the City of Chicago has for more than seven successive years paid all taxes legally assessed on above property under the color of title received in good faith by said city, bars complainants of any right, title or interest in above property and the above suit may be disregarded.

I am of the opinion that all objections can be cured and that the City of Chicago has a good title to the property known as the Gage Farm for the establishment of a City Nursery or a hospital for treatment of consumptives or sub-normal children, but that same can not be used as a site for

the John Worthy School, since the title is in the City of Chicago and not in the City of Chicago for school purposes.

Yours very truly,

ALBERT W. MAY,

Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,

Corporation Counsel.

DECEMBER 17, 1908.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Gentlemen:

We again call your attention to the lack of adequate drainage along the right of way of your road at Thirty-eighth and Central Park avenue. Your tracks at this point are elevated and run along Central Park avenue, apparently consuming the entire street. In widening the grade after the elevation of your tracks at this point you covered up the culvert on the east side of the tracks at your crossing at Thirty-eighth street and Central Park avenue, thereby obstructing the natural flow of water, and you have not provided any other means of drainage. This condition causes the water to back up, overflowing the territory south and east of your tracks at this point. This defect can easily be remedied by your putting a culvert in at this point.

You are required to provide proper drainage, such as the natural lay of the land requires for the necessary drainage thereof, by Section 20, Chapter 114, page 3232, Starr & Curtis' Illinois Statutes, 1906, which is as follows:

“CROSSING AND BORDERING STREAMS AND HIGHWAYS—EMINENT DOMAIN.—Fifth—To construct its railway across, along or upon any stream of water, water-course, street, highway, plank road, turnpike or canal, which the route of such railway shall intersect or touch; but such corporation shall restore the stream, water-course, street, highway, plank road and turnpike thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness, and keep such crossing in repair: PROVIDED, *that in no case shall any railroad company con-*

struct a road-bed without first constructing the necessary culvert or sluices, as the natural lay of the land requires for the necessary drainage thereof. . . .”

By the ordinance granting permission and authority to the Atchison, Topeka & Santa Fe Railroad Company to construct, maintain and operate a railroad, passed by the City Council August 1, 1887, Section 3712, Laws and Ordinances of Chicago, Myers & Son's Edition, 1890, page 1022, it was provided that:

“The said railroad company may cross at grade any and all intervening streets and alleys along the line of said routes as designated in the first, second and third sections of this ordinance, together with the side tracks, turn outs and switches, as above provided, said company to be subject at all times to the supervision of the Department of Public Works or other proper department or officer of said city in the construction of its said tracks and road and the keeping in repair of so much of said streets, alleys and crossings as may be occupied by the said railroad company by its tracks, switches and turn outs, provided the spaces between such tracks shall be brought to a level with said streets and alleys, by planking the same or paving same wherever the remainder of the street is or shall be paved. When the tracks of the said railroad company shall cross or intersect any sidewalk it shall keep the sidewalk in the spaces between its tracks in good repair and in safe condition;”

You will observe that by the provisions of the State law and the provisions of your charter hereinabove quoted you are required to provide the proper drainage, and unless your company proceeds within a reasonable time to do so we shall take such legal action as the nature of this case requires.

Let us hear from you at an early date, stating definitely what you propose to do in this matter.

Yours very truly,

WM. S. STAHL,

Assistant Corporation Counsel.

Approved:

EMIL C. WETTEN,

First Assistant Corporation Counsel.

DECEMBER 18, 1908.

ALBERT J. FISHER, Esq., Alderman Thirty-second Ward.

Dear Sir:

You have asked this office for an opinion on the validity of an ordinance recommended to the City Council December 7, 1908, page 1978, by the Committee on License, and ordered deferred and published, prohibiting the issuance of saloon licenses within the limits of a certain district therein described.

The territory affected by the ordinance is within the limits of the former Town of Lake, which became a part of the City of Chicago under the provisions of the State Annexation Law adopted April 25, 1889. Section 18 of the Annexation Act is pertinent to the present question, and is in its material parts as follows:

“When a part or the whole of an incorporated town, village or city is annexed, under the provisions of this act, to another city, village or incorporated town, and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dramshops within said territory so annexed, or any part thereof, or providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dramshops, then such ordinance shall continue in full force and effect, notwithstanding such annexation. . . . It is intended by this section to continue in full force and effect all ordinances of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dramshops is prohibited or regulated within said city, village or incorporated town, or any part thereof, without the voters of the territory so affected consent, as hereby provided, to the repeal of such ordinance by the city, village or incorporated town to which the territory is annexed.”

The general purport of the section has been thus explained by the Supreme Court in *Swift v. Klein*, 163 Ill., 269, where, in discussing Section 18, it was said:

“The enactment of an act of this character was within the power of the Legislature. Where a municipality, gener-

ally of lesser dimensions and population, is about to be annexed to a larger, whereby its legal power to protect itself by ordinances of prohibition or regulation of dramshop licenses might otherwise be taken from it and vested in a body which might disregard the wishes and thwart the will of the annexed district, it is a provision entirely proper and consistent that its desires, expressed by its ordinance adopted by the representatives of its people, be carried out by the larger district to which it is annexed."

Again, it is provided by statute that in the interpretation of laws all general provisions shall be liberally construed, in order that the true intent and meaning of the Legislature may be carried out, and it has been held repeatedly that in determining the meaning of any law the court will have regard to contemporaneous conditions and to the object sought to be attained. With reference to the object sought to be attained by Section 18, it was said in *People v. Harrison*, 191 Ill., 257, page 265:

"The answer of the respondents expressly set up that the statute was passed with reference to the annexation of Hyde Park. The purpose of the section being to secure to Hyde Park its prohibition districts and to secure and regulate the liquor traffic within its territory, that object should be kept in mind, and words used in the statute should be construed liberally to that end. . . . Any other holding by us than that the whole ordinance was meant by the statute would lead to absurd and most mischievous consequences."

See also *People v. Cregier*, 138 Ill., 401, page 422.

At the time of its annexation there was in force in the Town of Lake a general local option ordinance containing the following provision:

"Section 14. All applications for license to keep a saloon shall be made to the board of trustees in writing, stating the time for which such license is desired, not less than three months nor more than one year, signed by the applicant and accompanied by a petition of a majority of the legal voters of the town residing within one-eighth of a mile from the place where such saloon is to be kept."

It is clear that the City of Chicago may not reduce the

requirements of the above ordinance. Furthermore, in view of the repeated declarations of the Supreme Court, that the purpose of Section 18 of the Annexation Act is simply to protect annexed territory from the liquor traffic, and under the well settled rule that there can be no fixed or vested rights to engage in this business, it is believed that the city can impose such additional restrictions and regulations in what was formerly the Town of Lake as are not actually inconsistent with the ordinances which Section 18 seeks to preserve.

Assuming, however, that the proposed prohibition ordinance is passed by the Council and proves to be not otherwise objectionable, will the local option ordinance of the old Town of Lake be "continued in full force and effect" in the district affected? This question, we think, must be answered in the negative. Probably the only idea in the minds of the legislators in passing Section 18 was to prevent the city from issuing licenses in annexed territory on any terms more favorable to saloon keepers than those under which licenses were issued before annexation. But the words "continued in full force and effect" are so clear and expressive that it is impossible to see how the Council can now pass an ordinance which, if valid, would simply put the old ordinance out of existence. It does not require argument to show that if two ordinances are clearly repugnant to each other, so that the continued operation of both is impossible, the later ordinance operates as a repeal of the former. And in *Black on Intoxicating Liquors* it was said, Section 90:

"It is generally held that the enactment of a statute or constitutional amendment prohibiting the manufacture and sale of intoxicating liquors as a beverage operates to repeal and annul all previously existing laws which permitted such manufacture or sale under regulations or restrictions."

To this extent we believe that the Annexation Act qualifies the charter power of the city to *prohibit* the sale of liquor.

It must be concluded, therefore, that the present ordinance, being prohibitory in form, and therefore wholly inconsistent in its operation with the local option ordinance of the Town of Lake, would tend to repeal the latter ordinance and deprive it of its full force and effect. The proposed

ordinance is therefore in conflict with Section 18 of the Annexation Act and void.

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 24, 1908.

MILTON J. FOREMAN, Esq., Chairman Local Transportation Committee.

Dear Sir:

At your request and by the direction of the Corporation Counsel, I submit to you an opinion upon the following questions:

1. Has the City of Chicago power to prevent the carrying out of any agreement between the different railroad companies using the Union Loop, which, in effect, restricts the maximum capacity of the Loop, or which provides for the use of the Loop by the various companies in such a way as to be contrary to the public interest?

2. Has the City of Chicago authority to compel a routing of cars *on the Loop* that will give to the Loop its maximum capacity for the accommodation of trains?

3. In order to secure the maximum amount of service demanded by the public from the elevated railroads, has the City of Chicago the power to compel one company to route its cars over the line of another company?

4. Has the City of Chicago the power to compel the different elevated railroad companies to give and accept transfers?

In the first place, it is to be noted that all the elevated railroad companies in Chicago are corporations organized under the general Railroad and Warehouse Act of the State of Illinois as commercial railroad corporations. None of them are organized under special charters. The companies, there-

fore, have all the privileges, rights and immunities of ordinary railroad corporations and are subject to all the obligations of such companies, whether these obligations be to the public at large, to the city or the State.

Lieberman v. C. & S. S. Rapid Transit Co., 141 Ill., 140.

Knopf v. Lake Street Elevated Railroad Co., 197 Ill., 212.

While the different elevated railroad companies are commercial railroad corporations as far as their organization is concerned, in their actual construction and operation they are in effect street railways. All of the loop line, the line of the Chicago & Oak Park Elevated Railroad Company and considerable portions of the other lines are constructed and operated upon the public streets, and, in so far as the companies have their lines upon the public streets, there can be no question but that for practical purposes they may be considered as street railways, and in so far as their lines are not constructed upon the public streets, except at crossings, these elevated railroad companies perform essentially the functions of street railway companies. In two cases decided by the Supreme Court of this State the court has considered elevated railroads to be street railroads.

Doane v. Lake Street Elevated Railroad Co., 165 Ill., 510.

Bond v. Pennsylvania Railroad Co., 171 Ill., 508.

In the latter case the court said:

“Both parties refer to comment upon *Doane v. Lake Street Elevated Railroad Co.*, 165 Ill., 510, and other cases of similar character, but in that case it was pointed out that there was no distinction between surface and elevated street railroads, when the railroads there in question were regarded as street railroads constructed and operated for the public convenience and facilitating travel on such streets.”

In *Knopf v. Lake Street Elevated Railroad Co.*, 197 Ill., 212, in which the court held that *for the purpose of taxation* the Lake Street Elevated Railroad Co. should be considered as a commercial railroad corporation, the court said:

“In so far as these roads (referring to the elevated railroads in Chicago) are constructed and operated along the streets, facilitating local travel thereon, they certainly possess some of the characteristics of street railroads, but, inasmuch

as these companies are incorporated under the general railroad law as railroads with all the powers of the ordinary railroad company and are neither by their charges nor in their construction and operation confined to highways for their rights of way, we are of the opinion that they can not be classed as street railroads, nor the companies as street railroad companies, within the meaning of Section 15 of the Railroad Act."

As far as the control of the service of the elevated railroads by the city is concerned, the Supreme Court would probably hold that the city has all the powers over these railroads which it has over commercial railroads within the city, and in addition to these powers all the powers which the city has over street railways. All railroads, whether street railroads or commercial railroads, are affected with a public interest. They are not private, but public or quasi-public enterprises and over such enterprises or business it is well settled that the State has the largest measure of control. The State may regulate the service rendered to the public by such corporations, it may fix their compensation, prevent discrimination between individuals and between localities, and in general the State may insist that each one of such companies shall, as far as their duly authorized facilities will permit, give the utmost public service and that they shall not adopt business policies which are inconsistent with their public duties.

What the State has the power to do with reference to street railroads or commercial railroads wholly within the limits of the city, it may delegate to the city, but such powers as are not delegated to the city are retained by the State.

In addition to the powers of control over such corporations which the State may grant to a city, the city has such further power of control as it has reserved to itself under and by virtue of the terms of the licenses or franchises which it has granted to such companies. Whatever power over the service of the elevated railroads of Chicago the City of Chicago claims a right to exercise must, therefore, be justified either by virtue of a direct delegation of such power to the city by the Legislature or by virtue of the licenses or fran-

chises which have been by the city granted to and accepted by such companies.

Considering first the ordinances under which the Union Loop was constructed, we find that there are four separate ordinances, each giving to the grantee therein the right to construct and operate one side of the Loop.

The first ordinance was granted to the Lake Street Elevated Railroad Company and gave that company the right to construct, maintain and operate that part of the Loop which is situated on Lake street. This ordinance was passed October 1, 1894, and accepted by the Company October 3, 1894. This ordinance provided, among other things, that the "company shall cause its trains to be regularly and systematically run at such intervals as shall be necessary to accommodate the public, and the number of all such trains and the frequency with which they are moved shall be increased as the demands of the public shall render necessary, and the increase of traffic warrant."

The second loop ordinance was a grant to the Northwestern Elevated Railroad Company, passed June 24, 1895, and accepted by the company August 19, 1895. In terms this ordinance was one amending the original ordinance to the Northwestern Elevated Railroad Company, passed June 8, 1894, and gave authority to the Northwestern Company to construct and operate that part of the Loop located on Fifth avenue. It was provided in and by the ordinance that the Fifth avenue side of the Loop should be subject to the joint use of the Northwestern, Lake Street, Metropolitan, South Side and Union Elevated Companies "under any and all contracts now existing or which may hereafter be entered into between the same companies or any of them." The ordinance further provided that the Fifth avenue side of the Loop should be leased to, constructed and maintained by the Union Elevated Railroad Company for the joint use of the companies above named. This amendatory ordinance did not change the provision in the original ordinance which required the company to "cause its trains to be regularly and systematically moved at such intervals as shall be necessary to accommodate the public, and the number of all such trains,

and the frequency with which they are moved shall be increased as rapidly as the demands of the public shall render necessary, and the increase in traffic warrant.”

The next loop ordinance was a grant to the Union Elevated Railroad Company passed October 14, 1895, and accepted October 21, 1895. This ordinance gave the Union Elevated Railroad Company the right to construct and maintain that part of the Union Loop on Wabash avenue. The ordinance provided that the structure erected should be for the joint use of the Northwestern, Lake Street, Metropolitan, South Side and Union Elevated Companies “upon such terms and conditions as have been agreed upon under any and all contracts now existing between the said corporations or such contract or contracts as may hereafter be entered into . . . for the use and operation of the said railroad hereby authorized.” It is further provided “that all trains shall be regularly and systematically *used*, as shall be necessary to accommodate the public, and the number of all such trains shall be increased as rapidly as the demands of the public shall render necessary and the increase of traffic shall warrant.”

The fourth ordinance was a grant to the Union Consolidated Elevated Railway Company. This ordinance was passed June 29, 1896, and accepted by the company July 6, 1896. It gave to the company the right to construct and maintain that part of the Union Loop on Van Buren street. It was provided that the structure erected should be subject to the joint use of the Northwestern, Lake Street, Metropolitan, South Side and Union companies “upon such terms and conditions as may have been agreed upon in any and all contracts now existing . . . or such contract or contracts as may hereafter be entered into by the said companies or any of them for the use of said railroad.” It was also provided “that all trains shall be regularly and systematically moved, as shall be necessary to accommodate the public, and the number of all such trains shall be increased as rapidly as the demands of the public shall render necessary and the increase of traffic shall warrant.” Upon the passage of this ordinance by the Council the Mayor refused to sign it unless the Union and Union Consolidated Companies would enter into an

agreement providing additional stipulations and payments for the benefit of the city, whereupon such an agreement was executed by and between the Union Consolidated and the Union Elevated Railroad Companies, by the terms of which certain payments were agreed to be made to the city. The agreement further provided that the loop line should include all the structure theretofore authorized to be built upon Wabash avenue, Van Buren street, Fifth avenue and Lake street making a continuous "loop line." This agreement was approved by the Corporation Counsel and presented to the City Council and was by the Council ordered placed on file.

The Metropolitan, Lake Street and Northwestern ordinances all provide substantially, as do the loop ordinances, that trains shall be run regularly and systematically at such intervals as shall be necessary to accommodate the public and that the number of trains and their frequency shall be increased as rapidly as the demands of the public shall render necessary and the increase of traffic warrant.

Metropolitan W. S. E. R. R. Co. Ordinance April 7, 1892, Sec. 2.

Lake Street E. R. R. Co. Ordinance October 1, 1894, Sec. 4.

Northwestern E. R. R. Co. Ordinance January 8, 1894, Sec. 5.

The South Side ordinance does not contain such a provision. There is a provision, however, by which the city reserves the "right of regulating by ordinance the rate of speed . . . the heating of cars and depots, and also the right to impose such regulations as the Council may deem necessary for the protection and safety of the public." There is also a provision that the ordinance shall "never in any way or manner authorize any other railroad company or street or horse or dummy railroad company to use the franchise herein above granted."

Chicago & South Side R. T. R. R. Co. Ordinance March 26, 1888, Secs. 8 and 16.

All the loop ordinances designated a five cent fare for a continuous ride on the Loop and upon any line of railroad using the Loop. All the ordinances also provided that none

of the lines should be used by the rolling stock of any surface steam railroad and that the trains should be used for the transportation of passengers and the mails exclusively. Express provisions for connection of the various sides of the Loop were made in the ordinances at all junctions except Fifth avenue and Lake street. At this point the lines of the Northwestern and of the Lake Street companies cross each other and such an express provision was practically unnecessary.

It clearly appears from the three later loop ordinances that the City Council and the companies had in mind the ultimate construction and operation of a loop terminal upon which the trains of the South Side, Metropolitan, Lake Street and Northwestern companies should be operated under such agreements as might be entered into between the companies themselves. As far as I am able to ascertain from an examination of all data which we have in this office and from an examination of the annual reports of all the elevated railroad companies on file in the office of the Railroad and Warehouse Commission at Springfield, the only agreement now existing between the companies for the use of the Loop is the so-called loop lease of October 1, 1897, which provides that the four companies above named shall each have the right to run their trains upon the Loop. The agreement provides how the rentals are to be paid by the lessees and for the management of the Loop. For this latter purpose a Board of Managers was created, consisting of the Presidents of the South Side, Metropolitan, Lake Street and Northwestern Railroads respectively. The Board of Managers in a general way is to have the determination of all matters relating to the management and operation of the Loop line and its connections.

Among the other provisions of the Loop lease is the following:

“The said Board of Managers shall have the determination of all questions relating to the management and operation of said loop line elevated railroad and power house with its connections; provided, however, that in determining the number of trains entitled to use the said loop line elevated railroad, when the capacity of said railroad is not sufficient to

accommodate all the trains of all the lessees, each lessee shall be entitled to operate upon said loop line elevated railroad such proportion of the total number of trains operated thereon as the number of paying passengers carried by said lessee bears to the number of paying passengers carried by all the lessees, such proportion to be determined upon the basis of the last preceding monthly reports."

It is over the provisions of this clause in the lease that the controversy between the Metropolitan and the Northwestern, and, incidentally, the other elevated railroad companies, has arisen. The Metropolitan has filed a bill in the Circuit Court praying for specific performance of this part of the lease, claiming that it has been denied its proper share of trains upon the loop. The further claim is also set up that inasmuch as the Northwestern has succeeded to all rights of the other railroad companies, its president, being the president of a company which is both lessor and lessee, is disqualified to act as a member of the Board of Managers. The fact seems to be undisputed that the Board of Managers have not formally determined that the Loop has reached its capacity.

Aside from the loop lease I have been unable to find any other agreement respecting the operation of the Loop and I have not been able to find any agreement between the other companies as to the use of each other's tracks. If there were subsisting agreements between the companies which gave the companies the right to use each other's tracks, it might well be said that the public interest and the public welfare are so vitally concerned in the relief of the present congestion on the Loop, and that the obligations of the companies under their ordinances to give good service are so definite, that a re-routing of the trains which would relieve the present congestion might be compelled by the city, although such re-routing required the trains of one company to run over the tracks and use the equipment of another.

People v. Suburban Railroad Co., 178 Ill., 594.

In that case the Supreme Court in an original proceeding in mandamus awarded the writ to compel the Suburban Railroad Company to carry passengers from River Forest to Chicago and around the Union Loop at a rate of fare not

greater than that charged passengers from the Town of Cicero. In this case three significant facts appeared. The first was that there was a provision in the ordinance granted to the company requiring the company to give the same rates of fare to passengers in River Forest that it gave to passengers in the Town of Cicero; secondly, that in order to comply with the terms of the ordinance and in order to comply with the writ of mandamus issued by the court the company must necessarily transport passengers on lines of track which it did not own; and thirdly, that the Suburban company had perfected running arrangements with other lines of railroad owning the tracks necessary to make a continuous line to the Loop. The court based its decision upon the existence of all three facts and said on page 608:

“Whether mandamus will lie to require the respondent company to transport passengers beyond its own line does not arise. It appears from the petition the respondent company has perfected running arrangements with other lines of railroad, and is engaged in transporting its passengers, by means of its own cars and the cars of connecting lines to and around the ‘loop in the’ City of Chicago, and that it offers such service at all points in the village of River Forest, and the complaint is, it exacts a greater rate of fare for twelve continuous rides from points in the village of River Forest to and around the ‘loop’ in the City of Chicago than is charged for a like number of rides from the designated points in the Town of Cicero, contrary to its duty and obligation under the ordinance. The purpose of the petition is not to require the respondent to make arrangements with connecting carriers to carry passengers beyond its own line, for such arrangements already exist, and the respondent company is engaged in the business of furnishing transportation from the village of River Forest to and from the City of Chicago, but the design of the writ is to prevent discrimination in rates charged at points in the village and in that portion of the Town of Cicero specified in the ordinance.”

Reviewing the terms of the various loop ordinances it seems clear that it is the purpose and intent of these ordinances both on the part of the companies and of the city,

to provide a common terminal for all the elevated railroad companies in Chicago. In a way, therefore, the Loop is a part and parcel of each of the elevated railway systems. There seems to be nothing in the ordinances from which it may properly be said that the Loop is to be considered as a connection between the different elevated railway systems. If it were clear from the ordinances that the Loop instead of being a *terminal* was intended to serve as a *connection* between the lines of the different elevated railway companies, or if it appeared that the Loop was to be used both as a terminal and as such a connection, then possibly, even in the absence of agreements between the companies for the use of each other's tracks, a re-routing of trains which would necessitate the use of one company's tracks and equipment by the trains of another company might be compelled on the theory that the ordinances were intended to provide a unified system of elevated railways in Chicago. If this were true the various elevated railway lines might be considered as a unit by the city and it seems to me there would be valid grounds for requiring each company to place at the disposal of the other companies its track and equipment for the purpose of so re-routing the trains over the various railways that the ordinance requirements as to sufficient service might be fulfilled and the public interest thus served.

While taking into consideration the terms of the ordinances, and also the fact that the Loop does connect the various elevated railway systems and is, physically considered, in fact more than a terminal, it may be argued with much reason that, in order to carry out the service provisions of the ordinances, which are matters vitally affecting the public interest and public welfare and comfort, each road is in duty bound to place all its tracks and equipment at the disposal of the others under proper arrangements for compensation, I am of the opinion that, since the ordinances simply provide for a common terminal and contain no terms which can be construed as obligations, either express or implied, to place the track and equipment of one company at the disposal of the other, the courts would not uphold such a contention.

The next question is whether or not the Legislature has

granted to the City of Chicago the power to compel a routing of the trains of one elevated railway company over the tracks of another in order to promote the public interest and to facilitate travel in the city generally, and especially upon the public streets. Such power as has been delegated to the city in this respect is twofold,—first, such power as is delegated to the city because of the fact that it has plenary control over the public streets, and, second, such power as is given by the specific clause granting to the city the right to regulate street railway companies. The plenary control of the City of Chicago over its public streets will not be disputed. This control has been given to it in express terms by the Legislature.

Section 1, Article V, City and Villages Act, Clauses 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 28, 29, 66, 72, 89, 90, 96, 97. (Hurd's Revised Statutes, 1908, pages 316-320.)

The City of Chicago under its charter also has the power to regulate the business of street car companies and prescribe their compensation.

Section 1, Art. V, Cities and Villages Act, Clause 42, Hurd's Revised Statutes of Illinois, 1908, page 318.

“Forty-second: To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation.”

It has been expressly held by the Supreme Court that this clause gives to the city the power to license, tax and regulate street car companies.

Chicago Union Traction Co. v. City of Chicago, 199 Ill., 484.

For the reasons stated heretofore I am of the opinion that Clause 42, above quoted, gives to the City Council of the City of Chicago the right to regulate the elevated railway companies, 'at least in so far as they are located in and upon the public streets, and I am of the opinion also that that clause may be so construed as to give the city the power to regulate elevated railway companies even in cases where their tracks are built upon private rights of way, because essentially

the elevated railways of Chicago, no matter where located, perform the functions of street railway companies.

While it is clear that Chicago has plenary power to regulate the use of and traffic on the public streets, and while it seems to me to be clear that it has the right to regulate the elevated railway companies at least in so far as their tracks are built upon the public streets and facilitate travel thereon, I find no adjudicated case which goes so far as to hold that the powers of regulation thereby granted extend so far as to authorize the City Council to require one street railway company to use the tracks of another or to require one company to allow another company to use its tracks, and it has been held in this State that where ordinances granted to two street railway companies provide that one company may use the tracks of the other upon such terms as may be agreed upon, until the execution of such an agreement, one company can not compel the other company to allow it to use its tracks.

Chicago Gen'l Ry. Co. v. C. C. Ry. Co., 62 Ill. App., 502.

In the course of its opinion the court said :

“The ordinance of 1887, by which appellee acquired its right to lay down and operate its street railroad in the portion of Twenty-second street in question, is a law within the meaning of the Constitution. *Mason v. Shawneetown*, 77 Ill., 533; *City of Chicago v. McCoy*, 136 Ill., 344, 351; *Hayes v. Mich. C. R. R.*, 111 U. S., 237, 288.

“If the time of the court permitted, it would be interesting to enter upon a consideration of the many questions discussed by counsel. It may be conceded that public streets are held in trust by the city for the use of the public, and that as streets they can not be lawfully given or contracted away for mere private use; also that it is the case that the right of appellee to lay tracks in and thereon run cars through the streets of the city was given and exists solely because of appellee's undertaking and duty to serve the public; and that it can not maintain its tracks for all or any portion of a public street for no other purpose than to hold a right to the street, or for the object of keeping the public, either through another company, or in another way, from using the street in a manner that shall serve the public convenience. It is the

duty of appellee to use, for the benefit of the public, all the rights granted to it to lay tracks in the public streets, and to afford the public all reasonable and proper facilities in the way of travel over each and every part of its tracks; to do otherwise, to stand in this regard as a hindrance to the accommodation of the public, is a gross perversion of the privileges accorded by the municipal authorities to appellee.

* * * * *

“The right given to the Towns company to operate its cars over the tracks of appellee, is upon such terms and conditions by lease or contract as may be agreed upon between the companies owning said tracks or otherwise.

“The word ‘otherwise’ does not extend to appellants the right to use these tracks in the absence of either lease, contract, invitation, acquiescence, or estoppel, and in opposition to the will of those by whom the tracks are owned.

“The right, in consideration of services rendered the public, to lay tracks in a public street and to operate cars thereon, is a valuable property, and is therefore a property right. How lasting it may be, how it may be regulated or revoked, or taken away, is another matter.”

This case was appealed to the Supreme Court and the appeal was there dismissed in 1897 and before an opinion was handed down.

Another case to be considered in this connection is:

City of Chicago v. C. U. T. Co., 199 Ill., 259,

where it was held that a street railroad may be required by the city under the police power to clean that part of the street occupied by its tracks. In that case the court emphasizes the fundamental and well established principle that a street railway’s business and property are impressed with a public use and may be subjected to municipal regulations of a greater scope, in the interest of the public at large, than that of a railroad company exercising its franchises on its own road bed.

The court, in its opinion, said:

“The city, as the representative of the State, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preserva-

tion of the health, safety and comfort of the people. The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power or relieve itself of this duty, nor could the defendant in error company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety or comfort of the people. 'No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation. It can not be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police power resident in the State as an inalienable attribute of sovereignty.' Elliott on Roads and Streets, page 801."

The case of *Chicago Union Traction Co. v. City of Chicago*, 199 Ill., 579, is also useful. In that case it was held, among other things, that the Union Traction Company and the Consolidated Traction Company must exchange transfers, although the legal ownership of each company was in a separate corporation. The decision on this point was based upon the ground that two corporations were, in fact, owned and controlled by the same interests and the court laid down the general proposition that in performing the duty of a public utility company to the public the substance of things and not legal entities will be considered.

The court said (page 632) :

"The requirement, embodied in Section 1723, is imposed upon the street railroad companies therein specified by reason of their public character, and by reason of the fact that they are engaged in a public occupation which permits them to use the streets and highways of the people. The duty to give the transfer tickets, therein required, is a duty which arises out of the public character of their business. This duty rests not merely upon the technical owner, but upon the real, beneficial owner, and, in this case, it can not be doubted that the

Chicago Union Traction Company is the beneficial owner. . . . Where the duty of a public-service corporation to the public is to be determined, the substance of things will be looked to, and consideration should not be given to mere corporate fictions.”

Quoting from the opinion in a Texas case, which adopted the language of the New York Court of Appeals, the court also said (page 633) :

“We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth. This court has always refused to be controlled by technicalities when interposed to prevent an investigation into the real facts of a case. Courts will look beneath the masque of legal forms for the real facts of any transaction presented to them for investigation.”

Quoting from Lord Mansfield, in *Johnson v. Smith*, 2 Burr., 962, the court said (page 635) :

“It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.”

The court cited the following cases, all of which are in point on the general principle:

Buie v. C. R. I. & P. Ry. Co., 55 L. R. A., 861.

Stockton v. Central Railroad Co., 50 N. J. Eq., 74.

Attorney General v. Great Northern Ry. Co., 1 Drew & S., 157; 29 L. J., 794.

In this case the Illinois court has gone farther than courts in some other jurisdictions, notably in Wisconsin.

Ellis v. Milwaukee R. R., 67 Wis., 135.

The decision in the Union Traction case falls short of holding that the city can compel the giving of transfers by street railway companies not substantially under a common ownership and control in cases where the terms of the grants to the companies do not specifically provide for the giving of transfers, and I am of the opinion that the Supreme Court of this State would not go farther than it has gone in the Union Traction and Suburban Railway cases in upholding municipal regulation.

While I am of the opinion that the Supreme Court of this State would not uphold the validity of an ordinance requiring the routing of the cars of one company over the tracks of another, whether justified as a means of enforcing the provisions of the elevated railroad ordinances or under the charter, I do not believe that the contention that the City Council has the power to regulate the routing of trains on the Loop itself can successfully be controverted. That the Council has such power, it seems to me must follow from the terms of the loop ordinances themselves. The service provisions are clear, definite and comprehensive. The City Council may use every means in its power to compel the giving of the service required by the ordinances to the full extent permitted by the present loop structure. In doing this the Council simply will be enforcing the contracts which the companies have made. But in addition to the power to enforce the terms of the ordinances, the City Council under its power to regulate traffic on the streets and its power to regulate street railways, has the power so to regulate the routing of trains on the Loop as to secure the utmost service for the public. As has been said, the loop line is essentially a street railway, and our Supreme Court has held that a street railway "is merely a mode of facilitating existing travel, and of modifying or changing the existing public use. . . . The street car carries along the street such passengers as would otherwise be obliged to pass over it on foot or in other vehicles. . . . The interest of the street railway company, although a valuable one, is a part of the easement of the public in the street; it is carved out of such easement; it is accessory and ancillary to the existing right, resting in the public, of passing over the street."

C. B. & Q. R. R. Co. v. W. C. Street R. R. Co., 156 Ill., 255.

The power to regulate traffic on the streets is supplemented by the general grant of police power, and the city can not contract away or divest itself of these powers. The provision of the loop ordinances to the effect that the loop is to be used in common by the different companies under such agreements as they may make between themselves, therefore,

can not mean more than that the city will recognize such agreements to the extent only that they do not conflict with the public interest.

In view of the foregoing, therefore, I answer the questions submitted by your committee, as follows:

Answer to Question No. 1: Yes.

Answer to Question No. 2: Yes.

Answer to Question No. 3: No.

Answer to Question No. 4: No.

While I am of the opinion that under the terms of the railway ordinances and of the statute the city has not the power to compel the re-routing of trains by the Elevated Railroad Companies except on the Loop itself, it seems clear that the Legislature has the power, under the constitution, to delegate such power to the city.

Section 12, Article XI of the Illinois Constitution of 1870 provides:

“Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the General Assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State.”

Section 5, Article XIII of the Constitution provides in part:

“ . . . all railroad companies shall permit connections to be made with their track, so that . . . any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad.”

Among other provisions regulating railroads, the Legislature has enacted the following:

Every railroad corporation shall have power

“To cross, intersect, join and unite its railways with any other railway before constructed, at any point in its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings and switches, and other conveniences, in furtherance of the objects of its connections;

and every corporation whose railway is or shall be hereafter intersected by any new railway, shall unite with the corporation owning such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations can not agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in manner prescribed by law."

Hurd's Revised Statutes, 1908, page 1664.

"All railroad companies incorporated or organized under, or which may be incorporated or organized under, the authority of the laws of this State, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof; and also to contract for and hold in fee simple or otherwise lands or buildings in this or other States for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act."

Hurd's Revised Statutes, 1908, page 1669.

"All railroad companies incorporated or organized, or which may be incorporated or organized as aforesaid, shall have the right of connecting with each other, and with the railroads of other States, on such terms as shall be mutually agreed upon by the companies interested in such connection."

Hurd's Revised Statutes, 1908, page 1669.

". . . such railroad companies shall at all *junctions* with other railroads, and at all depots where said railroad companies stop their trains regularly to receive and discharge passengers in cities and villages . . . cause their respective depots to be open for the reception of passengers."

Hurd's Revised Statutes, 1908, page 1677.

Under Section 5, Article XIII of the Constitution, the Supreme Court has held that a railroad company must permit a connection of its tracks with a coal mine even in a case where a later connection with another railroad joins with and uses a small portion of its tracks.

Chicago & Alton R. R. Co. v. Suffern, 129 Ill., 274.

And in this State railroad companies are held to be common carriers of the *freight* cars of other railroad companies.

Peoria, etc., Ry. Co. v. C. R. I. & P. Ry. Co., 109 Ill., 135.

Peoria, etc., Ry. Co. v. U. S. Express Co., 136 Ill., 643.

Wabash R. R. Co. v. Farrell, 79 Ill. App., 508.

While the Legislature of this State has as yet not gone so far in railroad regulation as to require one railroad company to place its tracks at the disposal of another company for the running of its trains, I am of the opinion that under the Constitution where companies organized under the General Railway Act have a common terminal and where their lines are constructed for the most part wholly within the limits of the city, as is the fact in this case, the Legislature has the power to grant to the City Council the right to regulate the traffic of such corporations to the extent of requiring the trains of one company to be run over the lines of another company upon the paying of just and adequate compensation.

Similar legislation in other States has been upheld by the courts.

Sixth Ave. R. Co. v. Kerr, 45 Barb., 138.

Union Depot Ry. Co. v. Southern Railway Co., 105 Mo., 562; 16 S. W., 920.

St. Louis Ry. Co. v. Southern Ry., 105 Mo., 577; 15 S. W., 1013.

Metropolitan R. R. Co. v. Highland Street Ry. Co., 118 Mass., 290.

New Bedford, etc., R. Co. v. Achusnet St. R. Co., 143 Mass., 200; 9 N. E., 36.

Providence, etc., R. Co. v. Norwich, etc., R. Co., 138 Mass., 277.

South Boston, etc., R. Co. v. Middlesex R. Co., 121 Mass., 485.

Metropolitan R. R. Co. v. Quincy R. R. Co., 12 Allen, 262.

Covington Ry. Co. v. Covington, etc., Ry. Co., 1 Ky. Law Rep., 341; 19 Am. Law Reg., 765.

Toledo, etc., R. Co. v. Toledo R. Co., 50 Ohio St., 603; 36 N. E., 312.

Canal, etc., R. Co. v. Crescent, etc., R. Co., 41 La. Ann., 561; 6 So., 849.

See also:

Hudson Valley Ry. Co. v. Boston & Maine R. R. Co., 94 N. Y. Supp., 545.

State v. King, 104 La. Ann., 735; 29 So., 359.

B. & O. R. Co. v. Pittsburgh, etc., R. Co., 17 W. Va., 812.

North Baltimore, etc., R. Co. v. Baltimore, 75 Md., 247; 23 Atl., 470.

Kinsman, etc., Ry. Co. v. Broadway, etc., Ry. Co., 36 Ohio St., 239.

Jacobson v. Wis. Minn. & Pacific R. R. Co., 71 Minn., 519.

Wis. Minn. & Pacific R. R. Co. v. Jacobson, 179 U. S., 287.

In *Sixth Ave. R. Co. v. Kerr*, the court said:

“As to the right of the Legislature to permit one road to use the rails of another road, upon proper conditions, my conclusion is, that such grant is not (under the decision of the courts in regard to these roads in the public streets) a violation of any right of property. That the holders of such grants must be considered as holding them for public use, in the public street, which is all open to the public, and that the right to grant a crossing of the road necessarily involves a right to pass over a larger portion of such road when the Legislature so directed.”

In *Union Depot Ry. Co. v. Southern Ry. Co.*, the parties were street railroad corporations in the city of St. Louis. An ordinance of the city of St. Louis conferred upon the defendant company the right to use a part of plaintiff's track upon paying to plaintiff compensation for such use. The ordinance was enacted to carry into effect the following provision of the St. Louis Charter:

“Any street railroad company shall have the right to run its cars over the track of any other street railroad company, in whole or in part, upon the payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance, and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect.”

The ordinance provided substantially that when one com-

pany is authorized by ordinance to run its cars over the tracks of another company and the two companies cannot agree on the amount of compensation, the matter of compensation should be determined by three commissioners, one appointed by each company and the third by the Mayor.

From the decision of the commissioners an appeal was allowed to the Circuit Court. It was contended that the defendant could only acquire a right to run its cars over the other's tracks by the exercise of eminent domain; that the charter provision was unconstitutional and void and that the ordinance was invalid. The court held against all of these contentions.

On the first contention the court said that the State in delegating the power to a corporation to take private property for public use may attach conditions that the property shall be subject to the use of other corporations doing a like business, citing:

Metropolitan R. R. Co. v. H. S. Ry. Co., 118 Mass., 290.

Pacific Ry. Co. v. Leavenworth, 1 Dill., 393.

Joy v. St. Louis, 138 U. S., 1.

Railroad v. Railroad, 36 Ohio St., 239.

On the second contention it was held that the charter provision did not violate the Constitution, and on the third contention it was held that the provision of the ordinance with reference to the method of ascertaining the proper amount of compensation was valid, since the city had the power under its charter to provide a reasonable method and to provide for an appeal to the courts.

The court said (page 576) :

“Now, the charter confers upon the city the right to make rules and regulations for ascertaining the just compensation to be paid by one company for the use of the track of another company, and it is then made the duty of the assembly to enact ordinances to carry this provision into effect. The ordinance enacted points out a practical and fair method of fixing the amount. It seems proper that the award should be subject to review by some court competent to determine whether it was made according to correct principles of law. The power to provide for a review by the Circuit Court is, in

our opinion, a fairly implied incident flowing from the power expressly granted, and, therefore, within the second class of cases just mentioned. We must look to the nature, object and purpose of the expressed power, and also the subject-matter of which it treats; and, in doing this, we think it may be said the power expressly granted includes as an incident the power to provide for a review of the award by the Circuit Court."

In *Metropolitan R. R. Co. v. Highland Street Railway* it was held that it was properly within the discretion of the railroad commissioners under the statute to determine the rate of compensation to be paid by one street railroad corporation for the use of the tracks of another such corporation. The court said:

"The board of aldermen ordered the tracks of the respondent to be located over the streets above named, and other streets mentioned in its charter, and by the same order provided as follows: 'Said company shall have the right to make suitable connections, switches, curves and turnouts, to unite the tracks, hereby located, into a continuous line of railway from Grove Hall to Temple Place. And whereas the interests of public travel require that the said Highland Street Railway Company shall not lay additional tracks in any street where tracks are now located and constructed, except so far as may be necessary to fill the above location, this location is on the express condition that any tracks already laid in the streets or portions of the streets above mentioned shall be deemed tracks within the above location, for the use of the Highland Street Railway Company, to be enjoyed under the provisions, as to compensation to the corporation owning the same, provided by law.'

"By virtue of the respondent's charter, and of this order of the board of aldermen, the tracks of the Metropolitan Railroad Company in these streets were within the limits of the franchise granted to each corporation; and the respondent, so far as the franchise of running cars over these streets was concerned, had as much right as the petitioner, and, while it was bound to compensate the petitioner for the use and wear of its tracks, was not bound to make it any compensation for thereby interfering with its franchise or profits."

In *Covington Ry. Co. v. Covington, etc., Ry. Co.* (Superior Court, Ky., 1880) the following propositions were laid down by the court in an able opinion. First, that a street railway has only a qualified right in its track superstructure. Second, that the operation of street railways upon a public highway is an exercise of a public right of way and hence a legitimate use of such highway. Third, that the grant of a right to build and operate a street railway is subject to a right in the Legislature to grant the use of a part of said street railway, for an adequate compensation, to another company for the use of said other company. Fourth, that the proprietary right of a street railway company in its track is subject to the right of eminent domain. Fifth, that one Legislature has not the power by granting a franchise or license in a public street to bind succeeding Legislatures in such a way that the succeeding Legislatures are deprived of power to regulate and control the use of the street in such manner as may be determined the public welfare demands, nor can one Legislature, by such a grant, enable succeeding Legislatures to perform the duty of regulating and controlling the public streets.

The court said:

“The necessities and convenience of the public may require to-day but a single street railway, but circumstances may be so changed in half a score of years as to require many lines. From the nature, and the purpose for which they are used, street railways must be confined to streets, or other public thoroughfares, where the space that can be occupied by them is necessarily limited. It may be impossible to meet the demands of the situation, unless new routes, made necessary since the establishment of old ones, can be extended over some portions of streets already occupied by old ones, and it may be equally impossible, without unduly interfering with other uses of the streets equally necessary to public convenience and comfort, to give such street railway company a separate track throughout the length of its entire line.

* * * * *

“We, therefore, proceed to the question in the case, has the Legislature the power it attempted to exercise? The pre-

sumption is that it had. The burden is on the appellant to prove that it had not. This is attempted to be done by claiming that the appellant has a right of property in its track which, like ordinary property, is secured to it under the constitution.

“That it has a qualified right of property in its track superstructure may be admitted. But it will not be denied that an individual or corporation may place his or its property in such circumstances that the public may use it without and even against consent.

“The appellant holds title to its cars more absolute than its title to its track, yet as long as they remain in its track and are driven along the streets, the public have a right to enter and be transported in them to any point on its line, and to require that the car shall be stopped to enable them to alight. This right in the public arises from the circumstances in which the appellant has placed its property. The right to carry passengers is expressly given, but the right of the public to be carried is merely implied from the right in the corporation to carry. It is nowhere expressed. So the right of the public to have the appellant’s track used for transporting passengers in the carriages of other companies is not expressed. But may it not, like the right of individuals to be carried in the appellant’s carriages, be implied from the circumstances in which it has placed its track, and the nature of the business in which the track is adapted to be used?

* * * * *

“There was no attempt by express words in the appellant’s charter to give it the exclusive right to run cars upon the streets occupied by its track, or even upon the track itself, and we have decided that no such exclusive right exists as to the streets. As to the track placed in the street, and thereby made a part of the public highway, and which the exigencies of the public interest might demand for the use of other companies, we think the right to its exclusive use was received and held, subject to the power of the Legislature, to permit it to be used by such other persons or corporations as it might direct, whenever in the judgment of the Legislature a due

regard to the public right to use the street renders it necessary to do so.

* * * * *

“If we treat the track as the private property of the appellant, and as in a situation to be protected by the guaranty of the right to private property contained in the Constitution, the Legislature had no power thus to authorize it to be used, except in the exercise of the power of eminent domain. We must therefore hold in this aspect of the case, that, in giving the appellee the right to connect with and use the appellant’s track, the Legislature intended to exercise the power of eminent domain, and as it has provided for compensation the act was a valid exercise of that power.

“That the act did not provide for the appropriation of the whole property in the track is not a valid objection to it. It provides for taking such part of the use as the Legislature deemed necessary for the public use, and left the residue in the appellant.

“To have done more would have been unjust, and of doubtful constitutionality. If the appellant’s line continued to be necessary to the convenience and comfort of a portion of the public, it was due to that portion that only so much of the right to the use of appellant’s track should be taken as was necessary to the convenience of another portion.”

In *Hudson Valley Ry. Co. v. Boston & Maine R. R. Co.* the court said:

“Railroad companies are corporations of such a public character that it must be conceded that the Legislature has power to compel the interchange of cars and traffic in the interest of the public welfare, if it sees fit, and it seems to us that the court of appeals has decided that the Legislature has so enacted.”

I am of the opinion that the Legislature might grant to the city the necessary authority to compel through routing of trains by the elevated railroads by an amendment to the Cities and Villages Act; probably also the same result might

be accomplished by an amendment to the Railroad and Warehouse Act.

Yours very truly,

EDWIN H. CASSELS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 30, 1908.

JOHN J. HANBERG, Esq., Commissioner of Public Works.

Dear Sir:

In compliance with your request for an opinion concerning the liability of the various railroads whose elevated tracks cross streets to light the subways at such street crossings, permit me to advise you as follows:

Sections 1997 and 1998 of the Revised Municipal Code of Chicago of 1905 are as follows:

“1997. LIGHTS AT CROSSINGS.—Every person or corporation owning or operating any steam, elevated or street railway, whose track or tracks cross or intersect at, above or below grade any of the streets within the city, shall and they are hereby required to provide, at their own expense, proper and sufficient lights and care for the same at all such crossings or intersections. Such lights shall be of such kind as may be approved by the Commissioner of Public Works.

“1998. PENALTY.—Any such person or corporation failing to comply with the provisions of the last preceding section shall be fined not less than ten dollars nor more than one hundred dollars for each offense, and each day during which any crossing or intersection situated as aforesaid shall be permitted to remain without such lights after the first conviction shall constitute a separate and distinct offense.”

It would, therefore, seem that the only pertinent subject of inquiry is the authority of the city to pass the ordinance above quoted.

The powers possessed by the city having more or less application to the subject of your inquiry are those herein-

after set forth, all of which are to be found in Section 63 of Chapter 24 of Starr & Curtis' Annotated Statutes.

"*Ninth.* To regulate the use of the same (referring to streets).

"*Twentieth.* To regulate traffic and sales upon the streets, sidewalks and public places.

"*Twenty-seventh.* To require railroad companies to keep flagmen at railroad crossings of streets and provide protection against injury to persons and property in the use of such railroads, etc.

"*Sixty-sixth.* To regulate the police of the city or village and pass and enforce all necessary police ordinances.

"*Seventy-fifth.* To declare what shall be a nuisance and to abate the same and to impose fines upon parties who may create, continue or suffer nuisances to exist."

The city's powers relative to similar matters have been construed on numerous occasions, and your attention is invited to a few of the decisions in question.

In *City v. Chicago Union Traction Co.*, 199 Ill., 259, the court held that the city could, in the interest of the public health, safety and comfort, by a uniform ordinance, require street railway companies to remove all snow, dirt or other accumulations from so much of the surface of the streets as are occupied by their tracks.

In *I. C. R. R. Co. v. Willinborg*, 117 Ill., 203, it was held that a statute requiring a railroad company to fence its railroad tracks was a proper exercise of the police power of the State.

In *North Chicago Street Railway Co. v. Town of Lake View*, 105 Ill., 183, it was held that the city had authority to pass an ordinance requiring a street railway company to make its tracks, situated on a public street, conform to the grade thereof so as to enable wagons, carriages and other vehicles to pass over its tracks without inconvenience or danger and to punish a failure so to do.

In *C. & N. W. Ry. Co. v. City*, 140 Ill., 309, it was held that the police power of the city comprehended not alone the protection of life, liberty and property, but encompassed providing for the public convenience as well.

In *State ex rel. W. T. Co. v. Janesville*, 87 Wis., 72, 22 L. R. A., 759, an ordinance requiring guard-wires for electric wires where the latter crossed their electric wires was upheld as a valid exercise of the police power.

The citations of authority along this line might be multiplied indefinitely without serving any useful purpose, but those cited seem clearly to indicate that the City of Chicago has power to pass and enforce the ordinance first above quoted under the exercise of the various powers above enumerated.

It seems to be a matter that does not admit of contradiction that the portions of the public streets situated beneath the elevated tracks of the various railroad companies are dark and dangerous places and a convenient abiding place for hold-up men and other criminals unless sufficiently lighted to disclose to pedestrians the presence of the above mentioned gentlemen who might be lurking there, and that, therefore, the lighting of these dark subways is made necessary by the presence of the elevated tracks of the railroad companies, and it seems that the necessity of lighting may be well placed on the grounds of both public safety and public convenience.

In addition to the foregoing reasons the liability of the companies to light these subways might, in most instances at least, be placed upon another ground.

In the ordinances granted by the city to most of the railroad companies will be found, as a rule, a section quite similar to that which is taken from one of said ordinances and which is as follows:

“The permission and authority hereby granted are upon the express condition that the said railroad company (naming it) shall and will forever indemnify and save harmless the City of Chicago against and from any and all damages, judgments, decrees and costs and expenses of the same which it may suffer or which may be recovered or obtained against said city for or by reason of the granting of such privileges, or through or for or by reason of or growing out of or resulting from the passage of this ordinance or any matter or thing connected therewith, or with the exercise by said company of the privileges hereby granted.”

It would, therefore, seem that if the city finds it neces-

sary to light the subways lying beneath said tracks, in order to protect its inhabitants or to furnish a convenient means of passing under the railroad tracks of said companies, it has ample authority to collect from such railroad company having such a provision as that above quoted in its franchise ordinance the expense of so lighting such subways.

I am, therefore, of the opinion that the City of Chicago had authority to pass the ordinance first above quoted, and has ample authority to enforce the same, and in addition thereto the City of Chicago might, itself, light the subways lying beneath the tracks of a company whose franchise ordinance contained the provision of the general nature of that secondly above quoted, and collect from such company the expense of so lighting such subway.

Assuming that this ordinance is valid, I would suggest that you cause to be prepared lists of subways for the lighting of which each of the railroad companies in the city is responsible under this ordinance and designate the kind of lights which you approve the use of in each of the subways in question and thereupon cause to be served upon each railroad company the list of subways for the lighting of which it is responsible, together with the designation of the kind of lights as above suggested, at the same time notifying said companies to properly and sufficiently light said subways as indicated by said list, at the same time inviting the attention of the railroad company in each instance to the sections of the ordinance above quoted.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

DECEMBER 30, 1908.

B. W. SNOW, Esq., Chairman, Committee on Compensation.

Dear Sir:

Your letter, dated December 18, requesting an opinion as to whether there has ever been an acceptance on the part

of the city of Stone street between Banks and Goethe streets, has been assigned to me for reply.

The dedication of this street was made March 15, 1848, on which date a plat acknowledged and certified in apparent conformity to the statute of 1845 relating to plats and entitled H. O. Stone's Subdivision of Astor's Addition to Chicago was filed for record in the office of the County Recorder. A copy of this plat in the possession of the Chicago Title & Trust Co. shows a system of streets and alleys between what are now Banks street on the north, the Lake Shore Drive on the east, Division street on the south and North State street on the west, substantially identical with the manner in which the streets and alleys of that district have subsequently been laid out and used by the public for many years, so that it is apparent that the great majority, if not all, of the streets dedicated in the plat of H. O. Stone's Subdivision have been accepted by the city. It is true, that part of Stone street now under discussion has never yet been laid out or improved or even used as a street, but it has recently been held that an acceptance of some of the streets named in a plat constitutes an acceptance of all unless there can be shown some act or acts of the proper municipal authorities indicating a positive intention to reject the dedication of such streets or parts of streets as are not expressly accepted.

This principle was laid down in the case of *Village of Lee v. Harris*, 206 Ill., 428, in which it was said:

"It is insisted that an acceptance of some of the streets and alleys of a plat does not constitute an acceptance of the whole, and that proof of the acceptance of a part is not sufficient to vest the village with right to the use, possession and control of all the streets and alleys shown on a plat. We do not so understand the law, but, on the contrary, hold the true rule and doctrine to be, that an acceptance by a city or village of some of the streets and alleys appearing on a plat is an acceptance of the entire system of streets and alleys so appearing, unless the intention to limit the acceptance is shown. In *Village of Augusta v. Tyner*, 197 Ill., 242, we said (page 246): 'It is true that a street may be accepted in part and the remainder rejected, if it is proved that such was the

intention of the public authorities. An acceptance of some of the streets named in a plat will not constitute an acceptance of the whole, *if it is shown that there was an intention to limit the acceptance.*''

The above is the latest Illinois decision on this subject with the exception of *Reichert Milling Co. v. Freeburg*, 217 Ill., 384, where the following language is found, page 387:

"It is contended that the village took possession of Temple street east of Walnut street, and that such act of the village should be held to be an acceptance on its part of the entire street. The result does not follow. (*Jordan v. Chenoa*, 166 Ill., 530; *City of Chicago v. Drexel*, 141 Ill., 89.) In the Drexel case, on page 109, it was said: 'It is also urged that the acceptance by the municipal authorities of the Town of Lake View of other streets in said Hundley's Subdivision is to be regarded as a constructive acceptance of a street over the strip of land in question. The rule, which seems to be abundantly supported by the authorities, is, that when a person, in platting property, maps out streets thereon, the authorities may accept them in whole or in part. *An acceptance of a part is no acceptance of the whole.*' "

An examination of this decision, however, shows that the particular street under discussion was lost to the Village of Freeburg, not through a failure to accept the dedication, but because valuable improvements had been allowed to occupy the street for nearly fifty years, so that the village was held to be estopped in equity from claiming it. It is doubtful, therefore, whether the statement above quoted can properly be regarded as overruling the decision in the Harris case.

In the present instance there is no evidence of an intention on the part of the city authorities to limit their acceptance of the streets in Stone's subdivision so as to exclude that part of Stone street now in question, and the rule of *Lee v. Harris*, if the correct one, is entirely applicable to show an acceptance of the whole of this street. It is only fair to say, however, that this decision is in conflict with the great weight of earlier Illinois authorities, which take the position that, where a land owner has executed and recorded a plat showing

a system of streets, the municipality can not, by accepting only a part of the streets dedicated, be held liable for the acceptance and maintenance of the entire system. To this effect are *Russell v. Chicago & Milwaukee Elec. Ry. Co.*, 205 Ill., 155; *Jordan v. Chenoa*, 166 Ill., 530; *Chicago v. Drexel*, 141 Ill., 89, and earlier cases therein cited.

This appears to be the sounder rule and safer one for a municipality to support, so that we should hesitate in sole reliance on *Village of Lee v. Harris* to say that the whole of Stone street had been accepted. There are, however, other circumstances tending to show an acceptance of that portion of the street between Banks and Goethe streets.

On April 28, 1884, an ordinance was passed by the City Council providing for the construction of a wooden sidewalk on both sides of Stone street from Division street to Banks street, and for the levy of a special assessment to pay for the improvement. (See Council Proceedings, 1883-84, page 577.) While this ordinance was subsequently repealed on August 4 (Council Proceedings, 1884-85, page 121), which weakens somewhat its force as an acceptance, it was nevertheless a direct act of control on the part of the Council over the whole of Stone street and as such is strong evidence of acceptance. As is said in *Elliott on Roads and Streets*, 2d Ed., Sec. 153: "No matter what the particular act is, if it be one which could only be rightfully done upon a highway, it should be regarded as evidence of acceptance."

Furthermore the fact to which you call attention in your letter, that at the intersection of Stone street with both Banks and Goethe streets the return curbs and pavements have been carried to the inside of the sidewalk line, is clearly a material one as tending to show that the city has recognized this part of Stone street as a public street. There is also and has been for many years a city lamp post at the north intersection of Goethe and Stone streets with the names of both streets painted thereon.

It is also proper to note that no record can be found of the assessment of this portion of the street for taxation. In *Eisendrath & Co. v. Chicago*, 192 Ill., 320, it was said, page 326:

“The fact that no taxes or special assessments were levied upon it after it was platted is some evidence of acceptance. (*Lee v. Town of Mound Station*, 118 Ill., 304; *Earll v City of Chicago*, 136 id., 277.) The rule is, that formal acts of acceptance are not necessary, but whatever indicates an intention to do so is sufficient.”

We would also call attention to the fact that on the plat of H. O. Stone's Subdivision, which was recorded in 1848, this street was indicated by the name of “East Water street.” Diligent inquiry has failed to reveal the manner in which the name was changed from East Water to Stone street, but we are aware of only one way in which this can be done, namely, by the action of the City Council, which, since the adoption of the present charter, has had the power “to name and change the name of any street,” etc. It is at any rate clear that the Council has recognized this street by the name of Stone street for its entire length from Division to Banks street, not only in the local improvement ordinance above referred to, but also in the Council order which you mention in your letter and which was introduced September 25, 1905, for an asphalt pavement between Banks and Scott streets and was referred to the Board of Local Improvements. (Council Proceedings, September 25, 1905, page 1064.) And we are informed that the late Judge Tuley, whose opinion on questions of municipal law are entitled to the highest consideration, once held that changing the name of a street was a sufficient exercise of control by the Council to constitute an acceptance.

The above acts are believed to be sufficient to constitute an acceptance of Stone street for its entire length including the block from Banks to Goethe street. Nor does it seem that their effect should be lessened by reason of delays on the part of city officials, since there does not appear ever to have been an adverse possession of the street, much less improvements thereon, by reason of which the city might be estopped from asserting its rights. Mere nonaction is, of course, insufficient ground for an estoppel. The possible failure to accept the dedication promptly is of no consequence here, since the dedication was by a plat, in accordance with the statute, and could have been withdrawn or recalled only in the manner provided

by statute, that is by a deed of vacation. In *Hamilton v. C. B. & Q. R. R. Co.*, 124 Ill., 235, the court used this language:

“And in *Waugh v. Leech*, 28 Ill., 492, speaking of streets not used by the public, it was said: ‘If they (the streets) are not reclaimed by the original proprietor in some mode authorized by law, they remain public, open to the use of the public, whenever they may choose to appropriate them.’ And see *Town of Lake View v. LeBahn*, 120 Ill., 101; 2 Dillon on Mun. Corp., Sec. 642. We have statutes which provide for the vacation of town plats in whole or in part.”

For the foregoing reasons, we feel justified in answering your question in the affirmative and in advising you that the dedication of Stone street between Banks and Goethe streets has been accepted and that the street is at this time a proper subject for vacation by the City Council.

Drafts of vacation ordinances, transmitted with your letter, are returned herewith.

Yours very truly,

WILLIAM K. OTIS,
Assistant Corporation Counsel.

Approved:

EDWARD J. BRUNDAGE,
Corporation Counsel.

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